United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED DEC 20 1957
973
Joseph W. Stewart
CLERK

No. 14,194

WILLIAM UPSHAW,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Robert I. Thiel, Printer
Washington, D. C.
EX 3-0625

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JOINT APPENDIX

213 [Filed in Open Court February 13, 1956]

UNITED STATES DISTRICT COURT
For The District of Columbia
HOLDING A CRIMINAL TERM

G. J. No. 99-56 December G. J. 1955 - Impanelled Dec. 1, 1955.

District of Columbia) to wit: Sworn in Dec. 6, 1955.

We, the Grand Jurors of the United States of America, in and for the District aforesaid, upon our oaths, do PRESENT

1. Peter T. Collis
2. William Upshaw

for

Vio. 26 U.S.C. 4704A
21 U.S.C. 174

at the District aforesaid, on the 7th day of February, A. D. 1956.

/s/ Illegible
Foreman.

---

214 [Filed in Open Court February 13, 1956]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled December 1, 1955, Sworn in on December 6, 1955

The United States of America	:	Criminal No. 189-56
v.	:	Grand Jury No. 99-56
Peter T. Collis	:	Vio. 26 U.S.C. 4704a
William Upshaw	:	21 U.S.C. 174

The Grand Jury charges:

On or about January 2, 1956, within the District of Columbia, Peter T. Collis and William Upshaw purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, seven and one-half capsules containing a mixture totaling about 7.5 grains of heroin

hydrochloride, quinine hydrochloride, milk sugar and mannitol.

SECOND COUNT:

On or about January 2, 1956, within the District of Columbia, Peter T. Collis and William Upshaw facilitated the concealment and sale of a narcotic drug, that is,seven and one-half capsules containing a mixture totaling about 7.5 grains of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after the said heroin hydrochloride had been imported, with the knowledge of Peter T. Collis and William Upshaw, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

/s/ Leo A. Rover
Attorney of the United States
in and for the District of
Columbia

A TRUE BILL:

/s/ Illegible
Foreman.

---

215 [Filed February 17, 1956]

UNITED STATES)
vs.) Criminal No. 189-56
WILLIAM UPSHAW) Charge: Fed. Narcotics vio.
Defendant)

PLEA OF DEFENDANT

On this 17th day of February, 1956, the defendant William Upshaw, appearing in proper person, requesting the Court to appoint counsel which is so ordered, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads not guilty thereto.

The defendant is permitted to remain on bond.

By direction of

Present:

United States Attorney

By /s/ Robert Asman
Assistant United States Attorney

/s/ Thomas O'Neal
Official Reporter

/s/ Alexander Holtzoff
Presiding Judge
Criminal Court #Three

HARRY M. HULL, Clerk
By /s/ John B. Noone
Deputy Clerk

216 [Filed May 10, 1956]

UNITED STATES	)	Criminal No. 189-56
vs.	)	Charge: Violation of Section 4704a, Title 26, and Section 174, Title 21, U.S. Code.
#1 Peter T. Collis #2 William Upshaw	)	
Defendant	)	

On this 10th day of May, 1956, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited yesterday; whereupon the said jury after hearing further of the evidence and the instructions of the Court, alternate jurors, Milton Isen and Howard Gitlin, are discharged from further consideration in this case; and thereupon the jury retires to consider their verdict.

The jury returns into Court and upon their oath say that each defendant is "not guilty" on Count One and each guilty on Count Two of the indictment.

Each defendant is committed to the District of Columbia Jail and each case is referred to the Probation Officer of the Court.

By direction of

/s/ R. E. Thomason
Presiding Judge
Criminal Court #6

Present:

United States Attorney

By /s/ Arthur McLaughlin
Assistant United States Attorney

/s/ A. C. Valenzuela
Official Reporter

HARRY M. HULL, Clerk

By /s/ Daniel J. Mencoboni
Deputy Clerk

217 [Filed May 28, 1956]

United States of America)
v.) Criminal No. 189-56
William Upshaw)

JUDGMENT AND COMMITMENT

On this 25th day of May, 1956 came the attorney for the government and the defendant appeared in person and by counsel, Joseph DeChimay, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Violation of Section 174, Title 21, U.S. Code as charged in Count Two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Sixteen (16) months to Four (4) years and to pay a fine of One ($1.00) Dollar.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ R. E. Thomason
United States District Judge.

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218 [Filed June 26, 1957]

William Upshaw)
Petitioner,)
vs.) Criminal No. 2: 189-56
United States of America,) Nos. No. 1: 560-56
Respondent)

MOTION TO VACATE SENTENCE PURSUANT SECTION 2255, TITLE 28, U.S. CODE.

Comes now William Upshaw being first duly sworn according to law depose and say that I am the petitioner in the above-entitled cause, and moves this Honorable Court to vacate the judgment imposed in the above-entitled cause, and for good cause shown therefore state as follows:

That I am a citizen of the United States, and is over twenty one years of age, and at the present is incarcerated in the D.C. Department of Correction, Lorton Reformatory, Fairfax County, Commonwealth of Virginia.

219 That this Court has jurisdiction to issue such process of law, under due process of law, and in support of this Courts jurisdiction attention is called to the following: Section 2255, Title 28, U.S. Code.

On May 25th, 1956 petitioner was sentenced to serve twenty (20) months to four (4) years, in the United States District Court for the District of Columbia.

STATEMENT OF FACTS

The government overlooks that the "abandonment" cases involve disclosure of incriminating evidence before an arrest has been made, before police action violative of the fourth amendment has occurred, before the police have done anything which should be detterred; In the instant case, however, disclosure resulted from the unconstitutional arrest of petitioner, and the wrongful taking of him to the precinct.

The heart of petitioners argument is as follows:

The police officers unwarranted 'scooping up' of petitioner is the very kind of misconduct the Weeks doctrine is designed to deter. Police action violative of the fourth amendment is equally reprehensible whether the fruits of the lawless action are found in the course of a physical search of the person or are handed over on direction or by coercion or -- as here -- revealed in an unsuccessful attempt to avoid iminent discovery.

220 What the police find and how they find it -- short of consent, which is not at issue here -- is unimportant. What is important is the unconstitutional conduct -- as here the arrest of your petitioner, the patting down, the carrying away to the police precinct was a violation of petitioners Constitutional Rights.

Petitioner and co-defendant were indicted on a two count indictment, possession and facilitating of Narcotic drugs contrary to law. At petitioners trial, he was found not guilty of count number one possession, but was found guilty of count two facilitating of Narcotic drug.

Petitioner avers that the only conceivable basis for arrest was that one member in the group was recognized as a former addict, but this does not make the arrest lawful even as to the addict. United States v. Reynolds, 111 F. Supp. 589 D. D. C. 1953; United States v. Clark, 29 F. Supp. 138 (W. D. Mo. 1939). Certainly it does not make the arrest lawful as to petitioner.

Assuming, arguendo, that the circumstances were such as to justify the arrest of petitioners companion, this hardly justified the "scooping up" of petitioner as well. A citizen does not lose immunities from seizure of his person to which he would otherwise be entitled by mere presence of petitioner being in the company of a known drug addict.

221 Petitioner avers that the Court of Appeals recently observed in Wrightson v. United States, 95 App. D. C. 390, 393, 222 F. 2d 556, 558 (D. C. Cir. 1955) it is well established that the fourth amendment protects the people against unreasonable arrest as well as unreasonable searches. Thus, the wrongful arrest of petitioner -- without more -- marked a violation of the fourth amendment.

Petitioner avers that from the arrest until the incident in the hall the action of the police was motivated and bound together by a sole purpose -- to locate and seize any narcotics on petitioner or co-defendant.

Petitioner avers that to isolate the incident in the hall is not only to sanction means violative of the Fourth Amendment, but to encourage

further employment of such unconstitutional means by the police, the actions of the Weeks doctrine are emphatically to the contrary. E.G., United States v. Di Re, 332 U.S. 581, 595 (1948); Mueslein v. District of Columbia, 73 App. D.C. 85, 89, 115 F.2d 690, 694, (D.C. Cir. 1940).

Petitioner avers that the Supreme Court stated in the Weeks doctrine as follows:

The principals laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sancitity of a mans home and the pri-
222 vacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitute the essence of the offense, but it is the invasion of his indefeasible rights of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense, -- it is the invasion of this sacred right which underlies and constitute the essence of Lord Camden's judgment.

Can we doubt that when the fourth and fifth amendments to the Constitution were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and unreasonable character of such seizures? Boyd v. United States, 116 U.S. 616, 630 (1886), quoted with approval in Weeks v. United States, 232 U.S. 383, 391 (1914).

The applications of this liberal approach in the Boyd case itself is most lightening:

It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching aboungst his papers, are wanting, but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the

Constitution in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and pur-
223 pose of search and seizure. 116 U.S. 622.

Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their effecacy, and leads to gradual depreciations of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of citizens, and against any stealthy enroachments thereon. Their motto should be absta principiis." 116 U.S. 635.

CONCLUSIONS

This case involves the application of the deterrent remedy of exclusion developed by the federal courts to enforce the fourth amendment. By definition, therefore, the decisive issue is whether the character of the police action in the instant case is such that it should be deterred. In arresting petitioner, and whisking him away to the precinct where the police action on probable cause or were they acting unreasonably?

224 It is submitted that there was no direct evidence that your petitioner ever had in his possession or facilitated the alleged drugs. No evidence was produced that petitioner acted suspiciously before the arresting officers arrested petitioner. In fact, there is no evidence of any action or even expression of petitioner from which it could be inferred that petitioner was committing a crime. The government charged petitioner with possession and facilitating drugs in a two count indictment, at trial the government set forth to prove their charge as

stated in the indictment. Petitioner avers that he was convicted of count two of the indictment in which was a transaction, growing from the original charge, which was possession. It is submitted that in the instant case there was insufficient evidence to convict Petitioner.

Petitioner avers that the Court of Appeals for this circuit has recognized its power to enter "appropriate" and "just" judgment both before and after the judicial code of 1948 went into effect, and has many times received the sufficiency of the evidence in criminal cases and it has upon occasion reversed for lack of sufficient evidence to convict. See Kelly v. United States, 90 U.S. App.D.C. 125, 194 F.2d 150 (1952); Sleight v. United States, 65 U.S. App. D.C. 203, 82 F.2d 459 (1936); Williams v. United States, 91 U.S. App. D.C. 13, 14, 196 F. 2d 605 (1952).

225 Wherefore, petitioner prays that this motion be granted, and petitioner be released from further illegal custody.

Respectfully submitted,

/s/ William Upshaw
Petitioner

[JURAT]

226 [Certificate Of Service] [JURAT]

---

229 [Filed July 2, 1957]

ORDER

Upon consideration of defendant's motion to vacate sentence pursuant to Section 2255, Title 28 of the United States Code, it appearing to the Court that the files and records herein conclusively show that defendant is entitled to no relief, it is by the Court this 2nd day of July, 1957,

ORDERED that said motion to vacate sentence be and hereby is denied.

/s/ Bolitha J. Laws
Chief Judge

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232 [Filed October 11, 1957]

NOTICE OF APPEAL

Notice of appeal is hereby given this 10th day of July, 1957, that I, William Upshaw, petitioner, Box 25, Lorton, Virginia, hereby appeal to the U. S. Court of Appeals for the District of Columbia Circuit, from the order of this Court entered July 2, 1957, in favor of the United States and against William Upshaw, petitioner.

Respectfully submitted,

/s/ William Upshaw
Petitioner, per se

[JURAT]

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238 CRIMINAL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States vs. 1. Peter T. Collis Cr. No. 189-56 Supplemental
2. William Upshaw Page No. 3

Date	Proceedings
1956 Jul 5	No. 1: Counterdesignation of Record, filed. Cert. of Service. (Oliver Gasch, Lewis Carroll, Nathan J. Paulson)
Jul 14	No. 1 - PETER T. COLLIS: ORDER EXTENDING TIME for filing the record on APPEAL to and including AUGUST 15, 1956, FILED. McGarraghy, J.
Aug 13	No. 1, 2: TRANSCRIPT OF PROCEEDINGS: Pages 1-212, FILED. (Court's copy) (Reporter-Valenzuela)
Aug 13	NO. 1 - Peter T. Collis: ORDER extending time for filing Record on Appeal to and including September 15, 1956, Filed. TAMM, J.
Sep 10	NO. 1, 2: TRANSCRIPT OF PROCEEDINGS: Vol. Pages 1-212, May 18, 1956, Filed. (Original Copy) (Reporter-A. C. Valenzuela, Official Ct. Reporter, U. S. District Court, El Paso, Texas)

Date	Proceedings
Sep 14	No. 1: Record on Appeal delivered to the U. S. Court of Appeals for Joseph G. Weeda, Atty. Clerk's fee $6.80 paid and credited to the United States.
1957	
Jun 13	No. 1: Certified copy of Judgment from the U. S. Court of Appeals for the District of Columbia Circuit Reversing the case and remanding case to the District Court with directions to enter a Judgment of Acquittal, filed. (Opinion to be entered later) Dated 6-12-57.
Jun 14	NO. 1: Certified copy of Order from United States Court of Appeals Reversing the Judgment of the United States District Court and Remanding case to the United States District Court with direction to enter a Judgment of Acquittal, PRESENTED. JUDGMENT of ACQUITTAL Entered. Deft. released, Release Issued. CURRAN, J. (Reporter-Spatzer)
Jun 26	NO. 2: MOTION of DEFENDANT to vacate sentence pursuant to Sec. 2255, Title 28, U. S. Code, filed. (Prepared by Deft.)
Jul 2	NO. 2: ORDER DENYING motion to vacate sentence, filed. LAWS, C. J. (N)

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Washington, D. C.,

May 18, 1956

1 BE IT REMEMBERED,

That on the 18th day of May, A. D. 1956, trial in the above entitled and numbered cause commenced before the Honorable R. E. THOMASON, a District Court Judge, and a jury, at 2:00 o'clock p. m., during which trial the following evidence was introduced and proceedings had in connection therewith:

2 APPEARANCES:-

For the Government - Mr. Arthur J. McLaughlin
Ass't U. S. Attorney
Washington, D. C.

For the Defendant: Mr. Joseph G. Weeda
Peter T. Collis (LAPIANA & WEEDA)
Attorney at Law
Washington, D. C.

For the Defendant: Mr. Joseph de Chimay
William Upshaw Attorney at law
Washington, D. C.

* * * * *

MERVIN A. LUCAS,

a witness for the Government, having first been duly sworn, in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. Now, Officer, keep your voice up so we all can hear.

What is your full name? A. My full name is Mervin A. Lucas.

Q. And are you a member of the Metropolitan Police Department?

A. I am, sir.

Q. Were you a member of the Metropolitan Police Department on January 2nd of 1956? A. I was.

Q. All right. On that particular date of January 2, 1956, what

6 precinct were you attached to? A. Number Four Precinct.

Q. Number Four? A. Yes, sir.

Q. And Number Four Precinct is located where? A. 492 E Street, Southwest.

Q. And that is in the District of Columbia? A. Yes, sir.

Q. And on that particular date of January 2, 1956, was 902 - 4th Street, Southwest, in your precinct? A. Yes, sir, it was.

Q. And what hours were you working on January 2nd of 1956?

A. Eight until four p. m.

Q. Eight in the morning until four p. m. in the afternoon? A. Yes.

Q. And what beat did you cover, or what territory? A. I was covering the East side of 4th Street from Adams Drive to K Street.

Q. And was 902 - 4th Street, Southwest, on your beat at that time? A. Yes, sir.

Q. Now, calling your attention to that date of January 2, 1956, can you recall where you were on your beat at approximately 3:45 p.m. that date? A. Yes, sir. I was standing in the 800 block of 4th Street, Southwest.

7 Q. The 800 block? A. Yes, sir.

Q. And the 800 block, where you were standing, is how far from 902 - 4th Street, Southwest, in the District of Columbia? A. It is approximately a hundred feet.

Q. Who were you standing there with? A. Officer Burwell.

Q. All right. Now, at the time that you were standing in that immediate vicinity, did there come a time when you saw both or either one of these two defendants? A. I saw one of the defendants.

Q. All right, which defendant did you see? A. Mr. Collis.

Q. Collis, and when you say "Mr. Collis", will you point at him and identify him? A. Yes, sir, the fellow in the blue suit (indicating).

Q. All right, now, just tell us under what circumstances you first observed the defendant Collis on January 2, 1956. A. I was standing on the 800 block of 4th Street, on the east side, when he crossed from the west side to the east side of the 800 block of 4th Street.

Q. All right, and when he crossed the street, where did he go then, or what did he do? A. Well, first, he spoke to me as he came past. He proceeded south on 4th Street until he got to 902.

8 Q. Until he what? A. Got to 902.

Q. All right. Now, when you say he crossed the street and proceeded to 902, how was he going, was he walking, running, or what? A. He was walking in a normal manner.

Q. All right, and when you observed him in front of 902 4th Street, Southwest -- and, by the way, that is in the District of Columbia, isn't it? A. Yes, sir, it is.

Q. All right. What did he do when he arrived at that location? A. Well -- can I go according to what happened -- I wasn't standing exactly in the front of 902 ---

Q. No. I meant did you observe him as he approached 902 4th Street? A. I did.

Q. All right. As he approached 902 4th Street, Southwest, in the District of Columbia, was there anything unusual about his demeanor about that? A. No, sir. There was nothing unusual.

Q. Did there come a time when you saw him enter those premises ? A. I did.

Q. Was there anything unusual at the time you saw him actually
9 enter the premises? A. No, sir.

Q. After he entered the premises, what did you do or where did you go? A. Well, Officer Burwell and myself got in his automobile and made a U-turn and proceeded south until we got to approximately the middle of the 900 block of 4th Street, made another U-turn and we parked just opposite 902.

Then we got out of the car and went to 902.

Q. All right. What is located at 902 4th Street, Southwest? A. It is a house.

Q. A what? A. A house.

Q. How many people would you say lived in that house? A. That I can't say.

Q. Now, when you and the officer -- where did you park the car in reference to 902? A. About three or four doors from 902.

Q. Did you get out of the car? A. We did.

Q. All right. When you got out of the car, where did you go? A. We proceeded to 902.

Q. When you got to 902 what then happened? A. The door was partially opened, and Burwell entered first.

It is a vestibule there, and he opened the door.

10 Q. Well, now, describe what you mean by a vestibule. A. You enter one door, there is a hallway, then there is another door.

Q. And how large is that hall or vestibule, as you call it? A. I would say it is approximately three and a half feet deep by about four.

Q. Now, as you and Officer Burwell entered this first door and into this vestibule, did you see anyone? A. We saw the two defendants.

Q. All right, and where were they? A. Standing in the vestibule.

Q. That's between the two doors? A. Between the two doors.

Q. All right, and when you saw the two of them, just what were they doing or how were they standing there? A. Well, Burwell entered first.

Q. Who? A. Officer Burwell.

Q. Oh. A. And I was just to the rear of him. To my knowledge, Collis was standing facing or just to the side of Upshaw.

THE COURT: A little louder.

A. Collis was standing just to the side of Upshaw.

Q. Now, as they were standing in that position, in what direction would they be facing? A. Well, Upshaw would be facing west.

11 Q. Take us to the door, the front door, would they be facing the front door as you came in? A. Upshaw would be facing the front door and Collis would be facing the side of the wall.

Q. And how would Collis be facing with reference to Upshaw, I mean -- I will retract that. All right, how would Collis be facing in reference to where Upshaw was? A. Well, Collis would be facing north.

Q. I mean, would he be looking -- A. He would be looking to the side of the building.

Q. Where with reference to Upshaw, at him or away from him? A. To the side of him.

Q. How was he facing with reference to where Upshaw was standing? A. He had his face to Upshaw.

Q. And how far apart were they, would you say? A. About a foot and a half, approximately.

Q. Now, did you hear them say anything to one another? A. No, sir. I did not.

Q. And while they were standing in that position that you have described, then what next did you observe or what did you hear? A. Well, some object hit the floor.

Q. Now, where would you say this object hit the floor? A. It hit the floor just beside Upshaw.

Q. Now, which side would you say as to Upshaw, was it away from Collis or between he and Collis? A. I would say it was away
12 from Collis, to the side of Upshaw.

Q. Away from him? A. Yes.

Q. And this object, what did you do when you heard this object hit the floor? A. Well, we walked both men outside and I picked up the bottle.

Q. I will show you Government's exhibit marked for identification "No. 1" (Clerk marks same), Officer, and ask you if that is the bottle you picked up? A. May I examine it, sir?

Q. Surely. A. Yes, it is. It appears to be the same contents.

Q. And how far would you say it was from the defendants on the floor -- I will retract that. Where was it on the floor in reference to where the defendants were standing in the vestibule? A. It was partially behind the door, I'd say about approximately a foot and a half away from Upshaw.

Q. And at the time that you picked it up what did it contain? A. It contained seven and a half capsules, one-half capsule was empty and seven capsules were filled.

Q. What did the capsules contain? A. According to --

Q. No. What would you say was in the capsules? A. This white powder.

13 Q. All right. After you picked up this Government exhibit containing these seven white capsules from the floor, did you, in turn, turn it over to anyone? A. I did. I turned it over to Officer Burwell at the station.

Q. And at the time did you talk to either one or bothof the defendants in reference to Government's Exhibit 1? A. Well, Officer Burwell did all the interrogation.

Q. So that you have told us all that you know about it, is that right? A. Yes, sir.

MR. McLAUGHLIN: That is all.

ON CROSS-EXAMINATION

Questions by Mr. Weeda:

Q. Officer Lucas, you had seen the defendant Collis in the neighborhood prior to this incident, this defendant (indicating)? A. In the neighborhood of Southwest?

Q. Yes? A. Yes, I had.

Q. And on this particular day that you saw Mr. Collis you saw him coming across the street in the 800 block going west to east, is that correct? A. He walked, he came from the west side to the east side, he crossed to the east side.

14 Q. Did you observe anyone, Officer, at that time calling or beckoning to Mr. Collis? A. No, sir. I only observed him when he crossed the street from the west side to the east, from the west to the east side, he walked across to the east side of the street.

Q. You stated, Officer, that the defendant Collis spoke to you? A. Yes, sir, as he came past me, he did.

Q. What did he say? A. He said, "How are you doing?"

Q. What was that? A. Words to that effect, "How are you doing?"

Q. In other words, he recognized you? A. He recognized me.

Q. And you recognized him? A. Yes.

Q. Now, Officer, who drove the automobile that you and Officer Burwell were in? A. Officer Burwell. It was his automobile and he was the driver.

Q. And did you observe the defendant Collis walking into the premises, 902 - 4th Street, Southwest? A. Yes, I saw him go in there.

Q. How far away from the door of 902 4th Street, Southwest, was he when you pulled your vehicle up to the curb? A. Well, he was already in 902 4th Street by that time.

15 Q. When did you see him walk into 902 4th Street, Southwest? A. When I was standing on the sidewalk.

Q. And then you got into the vehicle and made a U-turn? A. Yes, sir.

Q. Officer, the front door of 902 4th Street, Southwest, was that door closed? A. It was partially open.

Q. What do you mean by "partially."? A. I would say approximately about nine inches it was open.

Q. About nine inches open? A. Yes, sir.

Q. Now, how big is that vestibule between the first door and the second door? A. I would say approximately three and a half feet by about four.

Q. Now, there is a second door, is there not, Officer? A. Yes, sir, there is.

Q. Now, what door did you see the defendant Collis and the defendant Upshaw behind, the first door or the second door? A. The first door entering from the street.

Q. Officer, did you inspect the premises at that time, or after that, to see what was behind the second door? A. No, sir, I did not.

Q. Do you know what is behind the second door? A. No, sir, I don't.

16 Q. Never bothered to look behind the second door? A. I never had an occasion to go into the building.

Q. Officer, you testified that the first door was open nine inches, is that correct? A. Approximately that, yes, sir.

Q. Approximately nine inches, and yet you say that you saw both defendants behind that door, is that correct? A. Not behind. I didn't say behind the door.

Q. Well, how did you see them, Officer, through the door?

A. I saw Collis enter. I never saw Upshaw until we opened the door.

Q. It was only after you opened the door that you saw them?

A. Upshaw, yes, sir.

Q. And who arrived first, who got out of the automobile first?

A. Well, I presume we got out at approximately the same time.

Q. Who was driving, you? A. Officer Burwell was driving.

Q. You got out at the same time but he was in front of you, was he not, Officer? A. When we got to the building he was.

Q. And who opened the door first? A. He opened it. He was in the front so he pushed the door open.

Q. So, up to that time you weren't able, from the time that you saw the defendant Collis approaching or going into 902 4th Street, Southwest, until the time you opened the door, you had no occasion to
17 observe either he or the defendant Upshaw, is that correct?
A. I never observed Upshaw until we entered the premises there.

Q. Now, did both you and Officer Burwell walk into the vestibule?
A. I did, when I picked the bottle up.

Q. Well, you said Officer Burwell opened the door? A. He had to.

Q. When he did, Officer, were both of these defendants in full view, in your full view? A. Yes, sir.

Q. You could see them both head to foot, correct? A. Yes, sir.

Q. Now, I will ask the question again, did you and Officer Burwell step into the vestibule at all, or did you remain outside? A. I did have to step in to pick up the bottle.

Q. Officer, they were in your full view, correct? A. After we opened the door, yes, sir.

Q. And yet you saw no hands move, did you see anybody move their hands? A. No, I didn't.

Q. Did you see anyone reach for their pockets? A. No. I can't say I did.

Q. And all you know is that you heard something drop? A. That
18 is right, sir.

Q. And yet you don't know whether or not the defendant Upshaw or the defendant Collis had anything in their possession, or that bottle, is that correct? A. I don't know who dropped the bottle. I can say that.

Q. Well, as a matter of fact, you said you didn't see a bottle drop, did you, Officer? A. I didn't. I heard an article drop.

Q. You heard something drop? A. That is right.

Q. You saw nothing that left physically the body of the defendant Collis? A. That is right.

Q. Nor the defendant, Upshaw? A. That is right.

Q. Therefore, you never saw that bottle, you never saw anyone throw that bottle, is that correct, Officer? A. That is correct.

Q. Now, Officer, where were you standing when you heard something drop? A. I was standing just to the side of Burwell.

Q. Now, where was Officer Burwell standing? A. He was standing facing the door as he opened it.

Q. You were standing to his left or to his right? A. I was standing to his left.

Q. To his left? A. Yes.

19 Q. Now, Officer, how wide is the door itself that is in that vestibule? A. I would say it is approximately about three feet.

Q. About three feet, and did you testify that that vestibule was about three and a half feet deep? A. I said approximately, sir. I never measured it.

Q. Well, would you say it was about three feet deep? A. I would say it was approximately about four feet; three and a half to four feet.

Q. And, Officer, when you opened that door, how does it open, outward or inward? A. Inward.

Q. Now, when Officer Burwell opened this door inwardly did it strike any of these two defendants? A. Not that I could see.

Q. Well, when he opened the door, was one defendant behind the door and one defendant on the other side of the door? A. They were both in clear view when he opened the door.

Q. Were they in a corner -- let me withdraw that question.

Were they behind the door when Officer Burwell opened it?

A. No, sir, they were not. They were between the two doors, but when he opened the door they were in clear view.

Q. Well, Officer, you have testified that that vestibule is three and a half to four feet, correct? A. I said "approximately".

20 Q. The doorway is about three feet, you testified? A. I testified to that. I didn't measure the door or the vestibule, so I am only giving you the approximate figures.

Q. Would you say the width of the bodies of both these defendants are a foot each? A. Yes, sir, approximately.

Q. And you still say, Officer, that you opened, that Officer

Burwell opened that door inwardly and that these two defendants were in full view; is that your testimony? A. The vestibule could be larger, sir, but they were in full view.

Q. Well, Officer, all right, would you describe -- you know what a foot is, Officer? A. Yes, sir.

Q. You say that this book (indicating) is about how wide? It is approximately about eight inches.

Q. How wide? A. About eight inches.

Q. So you know what a foot is? A Foot is about that wide (indicating), three of those, Officer, if you can picture it? A. Yes, sir.

Q. That would be three feet (indicating)? A. Yes.

Q. Now, from that, how wide or how deep would you say that vestibule is? A. I can only give you approximate figures. I can't give you
21 an exact figure on it.

Q. Now, Officer, you testified that the bottle was nearest to where the defendant Upshaw was standing, is that correct? A. That is right.

Q. Officer, you said you found a bottle partially behind the door, is that correct? A. Yes, sir.

Q. Now, when Officer Burwell opened the door and the defendants were exposed, was that door tight against the wall? A. No, sir. It wasn't tight against the wall, no, sir.

Q. Well, how far away from the wall would the edge of the door be? A. I would say about six to eight inches, approximately.

Q. When did you hear something drop? At what particular instant or point was it? Officer Burwell opened the door, correct? A. Right, sir.

Q. Then you heard something drop, is that correct? A. That is right, sir.

Q. Then you found this bottle behind the door, correct? A. Yes.

Q. And yet both defendants were in your presence and yet, Officer, you say that you did not see this defendant (indicating) or that defendant (indicating) move his hands? A. I can truthfully say that, sir.

22 Q. Officer, do you know whether or not the defendant Upshaw or the defendant Collis lives in those premises? A. According to the addresses they gave they do not.

Q. Well, did you make any invsetigation to determine where they do live? A. Officer Burwell did all the interrogation and the investigation of the case.

Q. You made no investigation as to what addresses these defendants lived at? A. He will have to testify to that himself.

Q. Did they admit - I am sorry, you say you didn't talk to them afterwards? A. No, I didn't.

Q. Officer, did you go to the precinct with them? A. Yes, I did.

Q. Did you talk to them at all on the way? A. I can't recall if I did any interrogation about this particular incident.

Q. Officer, were you at the precinct when the defendant Collis was searched? A. No, sir. I was not.

Q. When did you leave the defendant Collis? A. I left the station approximately about 4:15 P.M.

Q. At the time you left where were the defendants? A. I presume they were in the detective room.

Q. Well, do you know, without presuming? A. They were in the
23 detective room, which is located on the second floor.

Q. Officer, did anyone, or, did you ask anyone to ascertain whether or not there were any fingerprints on this particular object that is before you? A. No, sir.

Q. None at all? A. No.

Q. When you picked it up did you pick it up with your handkerchief or did you pick it up with your hand? A. I picked it up with my hand.

Q. Officer, isn't it a fact that when you said you heard something drop that the defendant Collis was in the custody of Officer Burwell? A. No, sir.

Q. Was anyone holding anyone at the time? A. At which time, sir?

Q. At the time you opened the door, or Officer Burwell opened the door, did you lay your hand on either of these defendants? A. No, sir.

Q. Did Officer Burwell lay his hand on either of these defendants? A. No, sir, neither one.

Q. You didn't ask them what they were doing there? A. He did ask them a question, and what he asked them I can't testify to.

24 Q. He asked them a question? A. Yes.

Q. The bottle hadn't dropped by then, had it? A. Something had dropped.

Q. It hadn't dropped? A. It had dropped.

Q. It had dropped? A. Yes.

Q. Officer, then you got out of the car three or four doors down from 902 4th Street, Southwest, and did you run or walk? A. We walked.

Q. You walked, and you are right alongside 4th Street, Southwest, are you not? A. Yes.

Q. Isn't that street trafficked by vehicles, automobiles, street cars? A. Yes, sir.

Q. It has a street car track? A. No, sir.

Q. Not on 4th Street, but automobiles go up and down, and back and forth? A. Yes, sir.

Q. It is a commercial area, isn't it? A. Yes, sir, it is commercial.

25 Q. What is alongside of 902 4th Street, Southwest, what kind of a building -- excuse me, what kind of a business? A. There is a whiskey store.

Q. Well, would you say that is on the corner? A. That is on the corner.

Q. "Walter Johnson's Liquor Store", is that familiar? A. That is right.

Q. And then you have 902? A. Yes, sir.

Q. And then, do you know what is next to 902? A. There is another house.

Q. What is that? A. There is another house next door, which is 904.

Q. Well, between the two houses is there a business? Well, I will ask you specifically, isn't there an empty pool parlor there?

A. There is a pool parlor down several doors from 902.

Q. Well, alongside--902 is just a hallway, you go into a hallway?

A. Into a vestibule.

Q. A vestibule? A. That is right.

Q. Then next to it there is a store, isn't that correct?

You have a grocery store on the corner - not a grocery store, a liquor store, on the corner, correct? A. That is right, sir.

26 Q. Then you have 902, where the vestibule is, then next to that you have another business, do you not? A. No, sir.

Q. Well, what is next, what is on the south side of 902? A. 904 is another house.

Q. Well, Officer, don't the fronts of these houses have businesses all up and down the 900 block of 4th Street, Southwest? A. Not those two particular houses.

Q. Beg your pardon? A. 902 and 904 are not businesses, they are private residences.

Q. Well, Officer, part of 902 there is a commercial front, isn't it? A. No, sir.

Q. At 904, isn't that a grocery store, Officer? A. No, sir.

Q. 906 is "Ted's Pawnbroker's Office?" A. I don't know the exact address of Ted's Pawnbroker's.

Q. You know there is a Ted's Pawnbroker? A. There is one in the block.

Q. Do you know whether or not 904 is a grocery store? A. No, sir. It isn't a grocery store.

Q. How long have you been in that neighborhood, Officer?

A. Six years.

Q. And you have walked the beat up and down the 900 block?

27 A. Yes, sir.

Q. Officer, just one thing, you know the father of this defendant, Mr. John Collis? A. Yes, sir. I know him.

Q. And where does he have a business there?

MR. McLAUGHLIN: I will have to object to that. I can't see the materiality.

THE COURT: The Court does not see the materiality of what the father does.

MR. WEEDA: I will show later on that the defendant knew the neighborhood and he was in the neighborhood for a certain reason, one of the reasons was, of course, that his father does own a delicatessen store within two blocks of this address.

THE COURT: All right, objection overruled.

Q. You know Mr. John Collis? A. Yes, sir, I do.

Q. Does he have a business in the 600 block of 4th Street, Southwest? A. He does, sir.

Q. And how long have you known Mr. Collis? A. Well, I have been down there approximately six years and he has been in that location for that length of time.

Q. All right. Now, during those years, Officer, have you seen the defendant Collis in the neighborhood or in that store? A. Yes, sir.

28 Q. So that he knew you, Officer? A. Yes, sir.

Q. But you know, as a matter of fact, Officer, that this defendant did for a period of time live at 629 4th Street, Southwest? A. No, sir, I did not.

MR. WEEDA: I have no further questions of this witness.

Questions by Mr. de Chimay:

Q. Mr. Lucas, how far were you from that doorway of 902 when you heard that bottle drop, how far from the dorway at 902 were you when you heard the object drop? A. I was standing -- Officer Burwell was standing right in front of the door and I was standing just to the side of him.

Q. How many feet from the doorway? A. Well, approximately about a foot.

Q. Would you say you were a foot from the door itself, the outside door? A. The entrance to the door, yes.

Q. I see. Now, when the door was opened what did you see inside in this vestibule? A. I saw both defendants.

Q. What? A. I saw both defendants.

29 Q. What was behind the defendants? A. There is another door.

Q. Was that door open or closed? A. The door was closed.

MR. DE CHIMAY: That is all.

ON REDIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. At the time you recovered the bottle from the floor did it have any Government stamps on it, of any kind, on this bottle? A. Not that I recall, sir.

Q. Well, now, you either know or you dont? A. Well, there wasn't any Government stamps.

Q. Now, at the time that you say you heard this object drop in this vestibule and you picked up this article from the floor, was there any other objects there that could have been dropped at the time? A. No, sir. There was nothing else.

Q. Nothing else but this bottle? A. That is right.

MR. McLAUGHLIN: That is all.

(Witness excused)

30 MR. McLAUGHLIN: Call Officer Burwell.

HAROLD H. BURWELL,

a witness called by the Government, first having been duly sworn, in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. All right, Officer Burwell, your full name is what? A. Harold N. Burwell.

Q. And you are a member of the Metropolitan Police Department? A. That is correct, sir.

Q. And assigned to what precinct? A. I am assigned to the 4th Precinct as a detective.

Q. Were you so assigned on January 2nd of 1956? A. I was, sir.

Q. On that particular date of January 2, 1956, what hours were you working? A. I was working eight to four.

Q. Eight in the morning to four in the afternoon? A. That is correct.

Q. And on that particular date of January 2, 1956, did you see Officer Lucas? A. I did.

Q. On that particular date did there come an occasion when you
31 and Officer Lucas were in the vicinity of 902 4th Street, Southwest, in the District of Columbia? A. There was a time.

Q. Just how did you get in that immediate vicinity of 902 4th Street? A. Around 3:45 p.m., on January 2, 1956, I was in the 800 block of 4th Street. I was standing on the east side of the street. Officer Lucas was also in the vicinity nearby, and we had been talking. At that time I saw Peter Collis -- Mr. Collis is the gentleman who is standing now (indicating) -- go across the street from the east side of 4th Street to the west side of 4th Street. As he went across the street, he approached a man whom I do not know. Then he immediately returned to the east side of the street and then he proceeded south on 4th Street to the 900 block, and he went into 902.

Q. Now, when you saw the defendant Collis go into 902 4th Street, what did you do? A. When I saw him go down 4th Street, after he talked to this fellow, I got in my car and I asked Officer Lucas ---

Q. Now, you said something to the officer. As a result of that what did you do and where did you go? A. I asked Officer Lucas --

Q. Now, you said something to Officer Lucas, is that right? A. That is right.

Q. Then where did you go and what did you do? A. I started
32 north on 4th Street and made a U-turn, came back to the 900 block of 4th Street, and made another turn and parked my car directly in front of 902 4th Street.

Q. All right. When you parked your car in front of 902 4th Street what did you do then? A. When I parked my car there I noticed that

the door to the vestibule at 902 4th Street was partially open. I could see part of the form of a person standing behind the door.

Q. Where were you at the time that you made this observation? A. I was getting out of the car, and I could see that as I went in through, I went directly through the vestibule.

Q. This is the vestibule of 902 we are talking about? A. That is right.

Q. Now, when you left your automobile you went directly to where? A. To 902.

Q. All right, and when you approached 902 - now, can you just describe the entrance there? A. There is a small vestibule with a ---

Q. Now, before you get to the vestibule, there is a front door, is that right? A. There is a front door.

Q. Now, do you have to go up any steps to get to that front door? A. No. You don't have to go up any steps. It comes right to the sidewalk.

33 Q. The front door is level with the sidewalk, is that right? A. I believe that is correct, sir.

Q. And would you say the house abuts or faces the sidewalk? A. The house faces the sidewalk.

Q. Even with the sidewalk? A. That is right.

Q. Now, when you got right in the immediate front of 902 4th Street, what did you do or what were you able to observe from that position? A. I could see that there were two persons standing in the vestibule.

Q. Now, how could you see that? A. Collis was standing partially behind -- was standing on the south side of the vestibule, and Upshaw was on the north side of the vestibule, and I could only see part of each.

Q. That is, before you entered? A. Before I entered.

Q. Now, as you entered 902, does that door swing to the right or does it swing to the left? A. To the left, or to the right? Now, I can't remember whether that door swings to the right or the left. I can't remember that accurately.

Q. All right. You made that observation. Then what did you do? A. I pushed the door open.

34 Q. All right, and when you pushed the door open what did you see then? A. I saw Collis and Upshaw inside.

Q. When you pushed the door open, how were the defendants facing? A. They were facing each other.

Q. And how, in reference to how you were facing, how would that be? A. I was facing east, Upshaw was facing south ---

Q. Don't give us that east and west. Now, you were walking in the door, is that right? A. That is right.

Q. Now, when you walk in the door you see Collis and Upshaw? A. That is right.

Q. And I believe your testimony is that they are facing one another? A. That is right.

Q. Now, when you walked in, would you say they were looking at you or were they looking away from you? A. Well, I don't think that when I came up they knew I was coming.

Q. Not what they knew or they didn't. Just tell us what you saw. A. I saw the two of them.

Q. Now, when you walked in the door (indicating) -- you understand and follow me -- you saw these two men after you pushed the door

35 open, is that right? A. That is right.

Q. Now, were they facing you, were they looking at you? A. I believe they could see me. After the door was pushed open, do you mean?

Q. Yes. A. After the door was pushed open they could see me.

Q. Were they facing you as you pushed the door open? A. Well, not directly. They wasn't facing directly at me. They were still facing each other. They were in a position to where they could turn their heads and face me.

Q. In other words, you were coming in the door? A. That is right.

Q. You were coming in the door, and then what happened?

A. As I opened the door, something fell on the floor.

Q. Do you know where it fell? A. It fell behind Upshaw.

Q. And what did you do -- what did they do, if anything, after you heard this something fall? A. When I heard this particular thing fall, I told Officer Lucas, who was behind me, who went along with me, to see what that was that they had dropped, and I asked both men to come outside, and both men came outside.

Q. You say, "both men", what men do you mean? A. I am referring to Mr. Upshaw and Mr. Collis.

Q. Now, when you saw these two men in this vestibule, then you

36 walked in the vestibule, is that right? A. That is right, sir.

Q. Now, how much room was in there at that time, after the three of you were in there, would you say it was pretty well crowded?

MR. WEEDA: I object to the very leading observation.

THE COURT: Yes, don't lead him.

Q. Well us what would be the size? A. What would be the size of the vestibule?

Q. Yes. How much space was in there? A. I think you are slightly confusing me by the way you are asking your questions. If I could describe the size of the vestibule, I think it would be easier for me to let you make the observation.

Q. All right, describe the size. A. I would say that the vestibule is more or less a square. It may not be a perfect square, but it is more or less a square, and I would say it is about four feet, that is a rough estimate, four feet square, maybe a little larger; not smaller, but larger.

Q. Now, you see that witness box you are sitting in, don't you?

A. Yes, I do.

Q. Would you say the vestibule is a little like that? A. It is a

37 little larger than that.

Q. A little larger? A. Yes.

Q. Did you actually see the object that fell on the floor? A. I did not see the object as it fell, no, I did not. I heard it.

Q. You heard it? A. That is right, sir.

Q. And could you tell us from what you heard whether or not, what type of object it was? A. Well, I couldn't say that. I don't know what it was. I know that something fell, and I know that it did not make a loud noise.

Q. Now, I show you Government's Exhibit marked for identification "No. 1". Did you have occasion to see that in the possession of Officer Lucas? A. I did, sir.

Q. I will ask you whether or not Officer Lucas turned that over to you? A. Yes, he did, sir.

Q. And after Officer Lucas turned the Government Exhibit over to you what did it contain? A. It contained seven small white capsules, and one-half of a capsule which did not have anything in it.

Q. And after Officer Lucas turned Government's Exhibit 1 over to you who, in turn, did you turn it over to? A. I went and I called
38 Officer Longo, who is assigned to the Narcotic Squad.

Q. Did you in turn turn it over to Officer Longo? A. Yes, I did.

Q. Now, at that time did you place the defendants under arrest? A. Are you referring to the time on the street, sir?

Q. Well, did you bring them out of the vestibule? A. Yes, sir, I did.

Q. And when you brought them out of the vestibule where did you bring them or what did you do with them? A. Well, I brought them out of the vestibule and waited 'til Officer Lucas came out. When he showed me the bottle with the small white capsules, then I told them that we were putting them under arrest and taking them to the 4th Precinct for further investigation 'til we found out what the bottle contained.

Q. All right. At the precinct, or in front of the premises there, did you have any conversation with either one or both of the defendants, Upshaw or Collis? A. I did.

Q. What conversation did you have, say, with Upshaw, and where did you have it? A. I asked --

Q. Where are we now, at the precinct or in front of the house?

39 A. In front of the house. I asked Upshaw if he lived at that address, 902 4th Street. First he said he did. Then he changed his story and he said he lived at 344 K Street, Southwest. Then I asked him why he was in the vestibule. He said that he saw Collis coming. He called Collis because he wanted to talk with him. I asked him what did he want to talk to Collis about. He refused to say what he wanted to talk to him about.

Q. Now, did you have any further conversation with the defendant Upshaw any time after that? A. I had further conversation with him after I reached the precinct.

Q. And was that in reference to catching him in that vestibule? A. Yes, it was.

Q. All right. What conversation did you have at the precinct? A. At the precinct I asked him which one of them had this bottle in their possession.

Q. You mean this Government's Exhibit 1 (Indicating)? A. That is right, sir. Both men denied having had the bottle in their possession. I asked both men if they could account for the fact that the bottle fell behind Upshaw. Collis stated that he heard the bottle fall but he did not see where the bottle fell from. Upshaw stated that he did not hear the bottle fall and that he did not have the bottle in his possession at

40 that time.

MR. McLAUGHLIN: That is all I have of this witness.

ON CROSS-EXAMINATION

Questions by Mr. Weeda:

Q. Officer Burwell, you have known the defendant Collis from observing him in that neighborhood, have you not, prior to this incident? A. Yes, I did know him.

Q. And you know that his father, Mr. John Collis, owns and operates "John's Delicatessen" in the 600 block of 4th Street? A. Yes, I know that.

Q. Therefore, you knew Mr. Collis before that date? A. Yes, I did.

Q. You say you observed him crossing in the 800 block from the west side to the east side, is that correct? A. I beg your pardon?

Q. At 3:45, about that time, on January 2nd, you said that you observed Mr. Collis walking from the east side, or from the west side to the east side in the 800 block on 4th Street, Southwest? A. That is right.

Q. Is that correct? A. That is right.

41 Q. Were you standing near the Jewel Theater, somewhere in the vicinity? A. I was standing in front of the Jewel Theater.

Q. That is on the west side? A. That is on the east side.

Q. On the east side? A. That is correct.

Q. So he was crossing on the other side? A. No, he went from the east side to the west side.

Q. You were on the west side? A. Who was on the west side?

Q. You? A. No, I was on the east side.

Q. That is correct, the Jewel Theater is on the east side? A. That is right.

Q. Now, you were there with Officer Lucas, were you not? A. That is right.

Q. At all times. He didn't leave you while you were observing Mr. Collis, did he? A. He didn't leave me?

Q. He didn't go away from you while you were observing Mr. Collis? A. He didn't go to any long distance, if that is what you mean, sir.

Q. In other words, he was observing with you? A. He was near-

42 by. Whether he was observing with me, I don't know. I asked him to come and go with me.

Q. So that he was with you? A. So he was with me then.

Q. So you don't know whether or not he saw Collis --- A. I don't know whether he saw what I saw or not. I couldn't answer that question.

Q. Where did Mr. Collis go after he crossed from the west side to the east side? A. Well, he crossed "I" Street, which is the next street running east and west, and he was walking at a rather rapid pace, and he went down to this vestibule and entered this doorway.

Q. Officer, as Mr. Collis approached you, did he give any sign of recognition? A. When he was coming across the street from the west side to the east side?

Q. Yes? A. He smiled.

Q. He was smiling at you? A. He smiled. I don't know who he was smiling at.

Q. Did you smile back? A. No, I didn't.

Q. Did you think he was smiling at you? A. I thought it was a form of recognition or something like that. I nodded my head.

43 Q. I see. And, Officer, you say you observed Mr. Collis walking on the 800 block across the street to the 900 block, right? A. Yes, I did.

Q. Did you see him go down past 902 4th Street, Southwest, at that time? A. No. I didn't see him go past there. I couldn't tell whether he went past it or not, but I know that he did go directly in the room. Now, he could have gone maybe a step past and walked in.

Q. Officer, how far away were you standing at that time from 902 4th Street, Southwest? A. From 902 4th Street, I would say roughly about maybe one hundred and fifty feet.

Q. Well, Officer, then at that time were you observing him?

You know positively that he walked into 902 4th Street?

A. I did not know what number he walked in at that time.

Q. In other words, you didn't know where he went in? A. I knew he went in one of the houses down there that was near the corner.

Q. And did you observe if and when he met up with the defendant Upshaw? A. I didn't see Upshaw at that time.

Q. You didn't see Upshaw? A. Not at that time.

Q. When was the last time you had seen Upshaw prior to that time?

44 A. When was the last time I had seen him?

Q. Yes? A. I don't remember.

Q. Now, Officer, you made a U-turn after you got into the car, is that correct? A. That is right.

Q. Went north and came south, and then you came north again?

A. That is right.

Q. About where did you park the car? A. I parked it directly in front of 902.

Q. It was directly in front of 902? A. Directly in front of 902.

Q. Could it have been a few doors down from 902? A. I said directly in front.

Q. Well, if Officer Lucas said --

MR. McLAUGHLIN: Objection, Your Honor.

THE COURT: Objection sustained.

MR. WEEDA: I am sorry.

Q Officer, you have been in the 900 block of 4th Street, Southwest, and have observed the neighborhood there, have you not, on many occasions? A. Yes, I have.

Q. Have you ever walked the beat? A. For six years.

45 Q. For six years. When did you stop walking beats, Officer? A. April 1, 1954.

Q. Then what did you begin doing? A. Then I was assigned as a precinct detective.

Q. So you have been a precinct detective since April of 1954? A. That is correct.

Q. So you are pretty familiar with the neighborhood? A. Well, I would say I am.

Q. What is on the northeast corner of the 900 block of 4th Street, Southwest? A. The northeast corner?

Q. Yes? A. The northeast corner of 4th Street, Southwest, is a vacant lot.

Q. What is the first building? A. The first building is a small delicatessen or variety store.

Q. A what? A. Small delicatessen or variety store.

Q. In the 900 block? A. I beg your pardon. I thought you said 800 block.

Q. I meant the 900 block, I'm sorry. A. The first building there is Levy's Department Store.

Q. Would that be 900? A. That would not be 900.

Q. What is at 900? 902 is where you say the incident happened.

46 A. 900 is Walter Johnson's Liquor Store.

Q. All right, what is next to Walter Johnson's Liquor Store, going south? A. What is next to Walter Johnson's Liquor Store?

Q. Yes? A. The next number would be 902.

Q. Yes. A. There is an entrance to go upstairs as 902. Right next to that is a little store. I can't pronounce the fellow's name.

Q. And what is 904, do you know, officer? A. 904 I am familiar with.

Q. There would be a grocery store there at 904? A. A grocery store? You may call it a grocery store, or you may call it a delicatessen, or a variety store.

Q. That is a business, and that whole block is all business fronts with vestibules that lead to living accommodations inside the buildings, is that correct? A. No, it is not entirely all business.

Q. How would you say it goes, from 900 to where the commercial part extends? A. After you pass -- the next door is a pawnbroker's exchange. Ted's Pawnbroker's. That is after the small variety store or delicatessen, or whatever you want to call it. Then after that there is a row of houses. After that there is a vacant store,

47 it was an egg and poultry store. Next to that was a grocery store. Next to that is Levy's Department Store.

Q. Well, Officer, at that time of day, 3:45, were there many people on the street in the 900 block of 4th Street, did you observe anyone on the street? A. There was some people over across the street in front of the Sanitary Barber Shop.

Q. Was there anyone standing near or around 902 4th Street, Southwest? A. Standing around or near?

Q. Yes? A. There may have been somebody standing on the corner. I don't know. I was not paying too much attention to who was standing there. I was trying to keep my eyes on the door.

Q. Could you say as a matter of fact whether you observed anyone else being within the immediate vicinity of 902? A. It is possible that there may have been somebody there.

Q. There was traffic on that street at that time, was there not, about that time? A. Yes, there would be traffic there.

Q. So that, therefore, it is not entirely a quiet area, is it? A. Not exactly.

Q. Well, Officer, as you made a U-turn, swung around and stopped in front of the premises of 902 4th Street, Southwest, you got out
48 of the car, did you not? A. I did.

Q. Were you driving? A. I was.

Q. Who got out first? A. I couldn't answer who got out first. I know I got out as soon as I parked, I got out on my side, came around, and Officer Lucas was on the opposite side, and he got out simultaneously. Now, as to whose foot actually got on the ground first, I do not know.

Q. I do not mean by that -- well, as you got out of the car you were directly on the street, were you not? A. Yes, I was.

Q. And Officer Lucas was on the sidewalk? A. He would have been on the sidewalk.

Q. On the sidewalk; and in going up, approaching the door, were you in front of or behind Officer Lucas? A. I came out and took the lead and went in front of him.

Q. You were in front? A. That is right.

Q. Then you say that you could see parts of two figures behind the door, is that correct? A. I could see one figure, I could see part of one figure between the door and the door sill. I could see part of another figure opposite, on the opposite side, where the door was
49 slightly parted from the sill on that side.

Q. In other words, you could see through the door at both ends? A. Well, it was partially cracked. I could just see that there was somebody standing there. Now, if you would ask me if I could recognize who I was looking at, I couldn't do that.

Q. About this crack in the door, how big is the crack in the door? A. How big is the crack in the door?

Q. Yes? A. I would say when the door opens out, when it swings out on the hinges, it may be about an inch or three-quarters of an inch, and you could see.

Q. Well, where is the crack? A. Between the door and the door sill, where the hinges are.

Q. That is on the inside? A. Yes, sir.

Q. You say you can see, how wide is that, three-quarters of an inch? A. When the door is swinging like that (indicating), it may be approximately three-quarters of an inch. It may be more, it may be less, but it was sufficient, with the sun shining you could see if someone was behind there.

Q. Would you say that that door, Officer, was open about nine inches when you first observed it? A. About nine inches?

50 Q. About nine inches. A. When I first observed it?

Q. Yes. A. That would be close.

Q. About nine inches? A. That would be close.

Q. How does that door open, does it open inward or outward? A. Well --

Q. When you grabbed the handle, the door knob? A. That door opens inward.

* * * * *

A recess was taken at 4:00 o'clock P.M., and upon reconvening at 10:00 o'clock A.M., May 9, 1956, proceedings were resumed as

51 follows: (The witness Burwell resumed the witness stand)

ON CROSS-EXAMINATION RESUMED:

Questions by Mr. Weeda:

Q. Officer, Burwell, that date was January 2nd of 1956, is that correct? A. Yes, sir, that is correct.

Q. How was the weather? A. The sun was shining.

Q. Was it cold? A. Well, not too cold.

Q. Were you wearing a topcoat? A. Yes, I was.

Q. So then it was cold somewhat, was it not? A. It was a cold day but not a severe cold day.

Q. Officer Burwell, how tall are you? A. Six feet four.

Q. How much do you weigh? A. 223.

Q. Officer Burwell, I think when I finished questioning you yesterday, we had come to a point where you and Officer Lucas had gotten out of the car and we approaching the entrance to 902 4th Street, Southwest, and you testified that you preceded Officer Lucas, is that correct? A. That is correct.

Q. What is the first thing that you saw as you were approaching
52 902 4th Street, Southwest? A. The first thing that I saw was that I could see, as I was talking to you yesterday, I could see through the crack of one side of the door, I could see, I could tell that there was a person in there because I could see the clothing. On the opposite side, I could see that there was another person standing there. I could just see part of it.

MR. WEEDA: May I use the chart, if Your Honor please? I think it would be much clearer to the jury.

THE COURT: Yes.

Q. Officer, I am going to attempt to draw a diagram (indicating on blackboard), according to your instructions.

Assuming this is 4th Street, Southwest (indicating). Now, that street, Officer, runs north and south, does it not? A. That is correct.

Q. We will indicate this as "north" and this as "South" (indicating). This, then, would be "east" and this would be "west" (indicating). Now, on the corner, at 900 4th Street, Southwest, there is a liquor store, is that correct? A. That is correct.

Q. Is that flush on the corner? A. Yes, that is on the corner.

Q. But there is a sidewalk? A. Yes, there is a sidewalk.
53 Q. So, we will say that is the liquor store (indicating), that would be 900? A. That is right.

Q. Now, where would that doorway be leading to 902, leading into 902 4th Street, would it be adjacent? A. It would be adjacent to 900.

Q. That would be here then (indicating)? A. That is correct.

Q. And you say there is a commercial front --- A. Next to the doorway there, there is another store front where there is a poolroom.

Q. So, the entrance to 902 would be here (indicating), is that correct? A. Yes, that is correct. And the poolroom is still 902.

Q. Then this next door is 904? A. That is right.

Q. And there is an entrance to 904? A. That is right.

Q. It is identical to 902, they are both the same? A. I couldn't speculate that far.

Q. All right. Now, Officer, you say you parked the car where? A. I parked the car in front of 902.

Q. Here? (Indicating) A. That is right.

Q. Can I make a space here for the sidewalk (indicating), you know
54 how wide that sidewalk is? A. I don't know, it's a sidewalk.

Q. Would you say it is about eighteen feet? A. I wouldn't say it is that wide.

Q. About how wide would you say it is, your guess or your opinion? A. It is a double sidewalk.

Q. It is a very wide sidewalk? A. I would say roughly six feet.

Q. Six feet? A. I would say roughly six feet would be close, and then right in front of this place, the portion that would ordinarily be a tree box space is also covered by brick.

Q. Measuring that entire distance, plus this brick space, how wide would that sidewalk space be? A. Well, say around nine or ten feet.

Q. Now, you parked the car directly in front of 902, is that correct? A. Yes, sir.

Q. That would be the car, facing north? (Indicating) A. That is right, sir.

Q. And you got out of the car and you walked across that sidewalk? A. That is right, sir.

Q. And then from there, Officer, you say you saw through a crack in the door, would that be on the north side? A. The hinges on the door.

Q. Is that where you saw the crack? A. The hinges on the side there, that is where Upshaw was.

Q. Upshaw was, then, in this position here (indicating)? A. That is right.

Q. And where was Mr. Collis? A. Mr. Collis was on the opposite side.

Q. That would be here? (Indicating) A. That is right.

Q. Did you, before you entered or opened the door, did you talk or shout to any one of those two or both of them? A. No, I didn't.

Q. Did you grab the door handle? A. I don't remember whether I grabbed the door handle or not. The door was partially open. It could have been pushed open by touching it and pushing the door open. I don't remember whether I used the handle or just pushed the door.

Q. You pushed the door, is that right? A. That is right.

Q. As you pushed the door how far did you push it in? A. I pushed it far enough inside so that Collis was clear of the door and it left Upshaw behind the door.

Q. In other words, there wasn't enough room in there to open that door, was there? A. Oh, yes.

56 Q. And they both would be standing in front of you? A. Oh, no. When I pushed the door open that left Upshaw behind the door and Collis was on this side.

Q. I see. Then Collis was fully exposed to you, is that correct? A. That is right.

Q. So that you were watching him, you could see him? A. I could see all of him.

Q. Could you see all of Upshaw when he was behind the door? A. No, I could see part of him.

Q. All right -- A. And then at that time I had Collis to come out and then Upshaw to come out.

Q. All right, Officer, I want to get to that point. You then had Collis come out, is the correct? A. I had Collis to come out first.

Q. All right, he came out first? A. That is right.

Q. And how far away did he come out from that doorway? A. Just stepped out to the sidewalk.

Q. Well, how many feet would that be? A. Well, to step out on this sidewalk, this vestibule runs up to the sidewalk, so if he stepped out on the sidewalk it would just be one step.

Q. When he stepped on the sidewalk was he next to you? A. Was he next to me?

57 Q. Yes? A. I was still in the vestibule.

Q. I see. Mr. Collis came out, and you were still in the vestibule? A. That is right.

Q. With Mr. Upshaw? A. That is right, and I brought him out immediately.

Q. Then you brought out Upshaw? A. That is right.

Q. Did they both come out into the street? A. Came out in the sidewalk.

Q. Is that when you heard a noise? A. I heard the noise before then.

Q. When you opened the door you saw Mr. Collis, is that right, you could see him? A. Yes. I could see him, and I could see part of Upshaw.

Q. From the time you opened the door and saw Mr. Collis, from that time, when did you hear a noise? A. I heard the noise as I approached, when I first put the hand on the door, that is when I heard the noise.

Q. Where was Officer Lucas at that time? A. Officer Lucas was behind me.

Q. In other words, you heard a noise before you even went into the door, is that right? A. Before I entered the door, I would say yes, because the noise took place about the same time as I pushed the door.

58 Q. Well, Officer, would you describe that noise? A. Well, it was just -- it wasn't a loud noise. It was loud enough for you to hear.

You could tell it was a small object.

Q. Do you know whether or not Mr. Upshaw or Mr. Collis might have made some movement in there with their feet or something? A. It didn't sound like a foot. It sounded more like a bottle or glass, or a little small glass, or something falling. It gave that type of sound.

Q. Can you describe what kind of a floor is in the vestibule of 902 4th Street, Southwest, what kind of composition? A. I believe it is a wood floor.

Q. Now, when you heard this noise, from which direction did it seem to come? A. It seemed to come from behind the door.

Q. Behind the door, in any particular side of the vestibule, or --- A. It came from the side where Upshaw was standing.

Q. That would be on the north side, then? A. That is right, sir.

Q. You say it was a very soft noise, Officer? A. No. I didn't say it was soft. I said it sounded like it was not a loud sound because it sounded as though it was the sound of a small bottle. It wouldn't make a very loud noise, it would make it loud enough where you could
59 hear.

Q. Well, could it have sounded like somebody hitting their foot? A. Not to me.

Q. All right. Who went in that doorway, Officer, after you had Mr. Collis and Mr. Upshaw outside? A. Officer Lucas did.

Q. And exactly what did you see him do? A. He went behind the door. Then he came out and he had this bottle.

Q. All right, did he hand the bottle to you? A. Yes, he did.

Q. And you got it with your hand, you grabbed it with your hand? A. That is right.

Q. You didn't grab it in a handkerchief or anything like that? A. No, I didn't.

Q. At that time did you know what the contents of the bottle were? A. No, I didn't know.

Q. Did you have any idea what it was? A. I had an idea it was narcotics.

Q. You weren't sure? A. No. I wasn't sure until the tests were made.

Q. Officer, did you at any time see that bottle in the possession
60 of Mr. Collis? A. No, I didn't.

Q. Did you ever see that bottle in the possession of Mr. Upshaw? A. I did not.

Q. In fact, you have never seen it in their possession, or in their custody, or actually physically holding it, did you? A. No, not at the scene, I didn't.

Q. All you know is that Officer Lucas went behind the door and brought out this particular object that is before you? A. That is the only thing he found on the floor.

Q. Did Mr. Collis ever admit it was his bottle? A. Mr. Collis denied it was his bottle.

Q. Officer, after Mr. Collis came out to the street, did you search him? A. Did I search him?

Q. Yes? A. Yes, I did.

Q. Did you go into his pockets? A. I more or less frisked him to see that he didn't have a knife or anything like that, for my own protection.

Q. From there did you take him to the station? A. Yes, I did.

Q. He was searched there, wasn't he? A. Yes, he was.

61 Q. What did you find as a result of the search on the defendant Collis? A. Well, he had his wallet, and some papers, things like that; nothing unusual.

Q. Did he have any money? A. I don't remember. I don't think he had any money. I don't remember any.

Q. You don't remember any? A. No. He may have had some but I don't remember any money.

Q. Was it a large amount, if you can remember? A. No, it wouldn't have been.

Q. Would you say it was less than a couple of dollars? A. Well, I don't remember any money.

Q. But you found nothing else. You found no narcotics? A. No narcotics was found on his person, no, sir.

Q. You didn't make any request to anyone to see whether or not that bottle had fingerprints on it, did you, Officer? A. No, I didn't.

Q. Do you do that normally when you find a bottle like that, an open bottle, where it is glass, and perhaps fingerprints would be on it, do you normally pick it up with a handkerchief? A. If I had picked it up myself I would have taken precautions to either pick it up by the top of it or some portion of it where that I would have a chance to get some fingerprints, but since I did not pick it up, and when Officer
62 Lucas had it in his hand in this manner (indicating), I didn't feel it was necessary to take any prints because I don't feel that it would have been fair to the defendants to try to get their prints along with Officer Lucas' prints, and it is possible that I would have gotten portions of any number of persons' prints.

Q. That is, just if the defendants' prints were on it? A. If the defendants' prints were on there, but I wanted to be fair with them.

Q. In other words, you didn't take any prints because Officer Lucas had grabbed the bottle in such a manner that it would have been impossible, perhaps, to determine whose fingerprints, if any, were on there? A. I don't know if it would have been impossible, but I don't feel I would have gotten as good prints as I would have gotten if he hadn't handled it in that manner.

Q. In other words, you wouldn't have made a request if you had gotten absolutely perfect fingerprints? A. Not absolutely perfect fingerprints. You are never sure you get perfect prints.

Q. But you made no request whatsoever? A. No, I didn't.

Q. So that you didn't even know whether or not there were any fingerprints on that bottle which would be that of the defendant Upshaw or that of the defendant Collis? A. No, I didn't.

63 Q. Now, Officer, you testified that Officer Lucas gave you the bottle as he came out of the doorway of 902 4th Street, Southwest? A. That is right.

Q. What did you do with the bottle from that point? A. From that point I opened the bottle and I looked at the capsules that were inside. I noticed that there were seven small white capsules. I noticed that there was a half-capsule which did not have any powder in it the same as the others.

Q. Excuse me, where did you do that, take the capsules out of the bottle? A. Right there on the sidewalk. I opened it and just poured them out on my hand, like that (indicating).

Q. And did you replace those capsules? A. I did.

Q. And then what did you do with the bottle? A. I took the bottle to the 4th Precinct, and Lieutenant Myers was in the station, and I spoke to him about it, and he and Lt. Sullivan went upstairs to the detective room with me ---

Q. May I interrupt? Could you speak just a little bit louder? A. Yes. Lt. Myers and Lt. Sullivan went up the second floor to the detective room along with me.

Q. Let me interrupt again. I want to know exactly who had the
64 bottle at the precinct? A. I had the bottle.

Q. And where did you have the bottle? A. I had it in my hand.

Q. In your hand? A. That is right.

Q. At all times? A. Well, I don't think so at all times. I had it in my hand. Later on I put it in my pocket, until after Officer Longo came.

Q. Well, after you left 902 4th Street, Southwest, where did you have that bottle, I mean immediately after you left, you got into the car, did you not? A. Yes. I put it in my pocket.

Q. You put it in your pocket? A. That is right.

Q. And then you went to the precinct? A. That is right.

Q. And there you had it in your hand? A. In my hand.

Q. You say you had it in your hand? A. That is right.

Q. Did you give it to anyone at the precinct? A. No. I only showed it to Lt. Myers and Lt. Sullivan.

Q. Did Leiutenants Myers and Sullivan open up the bottle and look at the contents? A. I believe Lt. Myers opened it up and looked at it.

65 Q. In your presence? A. In my presence.

Q. Who else was present? A. Lt. Sullivan.

Q. What did he actually do with the bottle? I mean, show us what he did. A. Opened it up and looked at it, like that (indicating), and he said,"It does look like narcotics."

Q. Did he smell it? A. I don't believe he did.

Q. Then what did he do? A. He gave it back to me.

Q. He replaced the capsules, did he not? A. He put them back in the bottle.

Q. I see. Then what did you do with the bottle after that? A. I put it back in my pocket.

Q. And when did you take it back out of your pocket? A. Then I took it out of my pocket and I told Officer Lucas to mark the bottle so he would recognize if it he had occasion to see it again in court.

Q. Officer, confine your answers to my questions, don't tell us what you told Officer Lucas, but you say that you gave it to Officer Lucas? A. That is right.

Q. All right. How long did Officer Lucas have the bottle?

66 A. He had it long enough to mark it.

Q. And in whose presence did he do that? A. In my presence.

Q. Is there a mark on that bottle? (Indicating) A. Here is his mark here (indicating).

Q. What kind of a mark is it, Officer? A. "M. L." on it, right here (indicating). You can hold it up so you can see through the light.

Q. What does "M. L." stand for? A. Mervin Lucas.

Q. Who put "H. B." on here? A. I did.

Q. You are sure that Officer Lucas stayed at the precinct, Officer? A. No. He left after he -- (pauses) --

Q. After he what? A. Wait a minute, I am off on his mark at the precinct. I gave the bottle to him and he looked at it, and I marked it, and he later marked it. He marked that bottle later on, he didn't mark it at that time.

Q. When did he mark that bottle later on? A. He marked the bottle when this bottle was shown to him at the Commissioner's before the arraignment.

Q. Well, how long was that, Officer, after you were at the precinct, in the matter of days, how long after that was it? A. Well, I
67 don't remember the date of it.

Q. Well, would it be a week after? A. I don't remember that. It possibly was.

Q. Do you have any notes there? A. Well, he was there when I marked it and showed him my initials so he would be able to remember it, and later on he marked it himself.

Q. That is what I want to find out, what was the interval of time between the time you marked it and Officer Lucas marked it?
A. I couldn't tell you how many days there were, sir.

Q. Well, when was it that he marked it? A. He marked it the day of the arraignment before the Commissioner.

Q. You mean the hearing before the Commissioner? A. The hearing before the Commissioner, yes.

Q. Do you have any notes which might indicate what date that was?
A. I believe that was on the 24th of January.

Q. In other words, then, this incident occurred on the 2nd, right?
A. That is right.

Q. So that was an interval of twenty-two days before Officer Lucas marked it? A. That is right.

Q. But he did not mark this bottle at the precinct? A. No. I
68 marked it at the precinct.

Q. You say that is his mark in here? (Indicating) A. Yes, it is.

Q. I am looking at the light. I see an "H. B.", and I see something that looks like marks, but I cannot see anything distinguishing up there as a mark besides "H. B." A. Right here (indicating), "M. L."

Q. How did you make this mark, "H. B.", on there, Officer?
A. I used a paper clip.

Q. You didn't mark the bottle, you just marked the cap? A. I marked the cap, that is right.

Q. You didn't mark the bottle in any way? A. I tried to scratch the bottle with the clip, but I couldn't scratch it.

Q. But you didn't put any identification on this bottle? A. No, I didn't.

Q. Is this a common bottle, Officer, if you know, that may, that's got on here "Control Dental Stain, Helps Keep Teeth Clean, Dental Stain Remover". A. You say is that a common bottle?

Q. What I mean is, you see many of this type of bottles? A. I have seen bottles that size before.

Q. And would all the caps be the same, normally? A. I couldn't answer that. I have seen them without caps and I have seen some with caps on them.

Q. Now, Officer, after you had marked that bottle, then what did
69 you do with it? A. I called Officer Longo at his home and told him that I had picked up these two men and that they had a bottle with seven capsules and a half-capsule...

Q. You told him they had a bottle? A. I told him that they had a bottle in their immediate vicinity or possession and I would like for him to come down and look into the case, because he was on the Narcotic Squad, I felt that he was more qualified to make a field test than I would be able to.

Q. You are not qualified to make a field test, Officer? A. No. I am not qualified. I have never made one.

Q. I see. Then you called Officer Longo and then you turned the bottle over to him, I assume? A. That is right.

Q. When you turned it over to him what did Officer Longo do with the bottle -- strike that. Did Officer Longo open that bottle? A. Yes, he did.

Q. Did he make any marks on the bottle? A. Did he make any marks on the bottle?

Q. Yes? A. He made a mark on the top.

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Q. Is this a common bottle, Officer, if you know, that may, that's got on here "Control Dental Stain, Helps Keep Teeth Clean, Dental Stain Remover". A. You say is that a common bottle?

Q. What I mean is, you see many of this type of bottles? A. I have seen bottles that size before.

Q. And would all the caps be the same, normally? A. I couldn't answer that. I have seen them without caps and I have seen some with caps on them.

Q. Now, Officer, after you had marked that bottle, then what did
69 you do with it? A. I called Officer Longo at his home and told him that I had picked up these two men and that they had a bottle with seven capsules and a half-capsule...

Q. You told him they had a bottle? A. I told him that they had a bottle in their immediate vicinity or possession and I would like for him to come down and look into the case, because he was on the Narcotic Squad, I felt that he was more qualified to make a field test than I would be able to.

Q. You are not qualified to make a field test, Officer? A. No. I am not qualified. I have never made one.

Q. I see. Then you called Officer Longo and then you turned the bottle over to him, I assume? A. That is right.

Q. When you turned it over to him what did Officer Longo do with the bottle -- strike that. Did Officer Longo open that bottle? A. Yes, he did.

Q. Did he make any marks on the bottle? A. Did he make any marks on the bottle?

Q. Yes? A. He made a mark on the top.

Q. Will you show me that mark, Officer? A. "D. L." (Indicating)

Q. Is that in ink or is that scratched? A. That is scratched in
70 there with a pen similar to this (indicating), which has a metal point, also makes an impression as well as leaving ink on the impression.

Q. That mark is also on the cap? A. Yes, it is.

Q. He made no mark on the bottle? A. Not to my knowledge.

Q. Then what did Officer Longo do with the bottle? A. He took one of the capsules out and poured part of the contents out into a vial and then he put a chemical of some sort in it to see what type of reaction he would get.

Q. I see. Now, Officer, when he removed that cap, what did he do with it? A. What did he do with the capsule?

Q. With the cap of the bottle? A. He laid that on the desk.

Q. Did he make the mark before or after? A. Before or after he laid it down there?

Q. Yes? A. I couldn't remember that far back, whether he made -- would you state your question again,please?

Q. Did he set the cap down before he made the mark, or did he make the mark first? A. He made the mark before he set it down.

Q. In other words, he got the bottle and made the mark? A. That is right.

71 Q. Then he opened it and set it down? A. No. He took the cap off and then marked it.

Q. He didn't mark it while it was on the bottle, then? A. No.

Q. I see. Officer, are you positive that that would be the very same original cap on that bottle? A. According to my mark on there, and Officer Lucas' mark on there, Officer Longo's mark on there, I would say it is the same one. I would be positive because I have not marked any other cap similar to this one since the 2nd of January, 1956.

Q. You are positive that is the same cap. Could you be positive that is the same bottle? A. Well, I would say that this is the same bottle because this cap was put on this bottle and it is not a practice to change the bottle.

Q. Officer, I don't know, I don't want to know about the practice, I only asked you if you are positive that is the same bottle? You are positive it is the same cap.

Are you as positive it is the same bottle? A. I could say yes, I am positive it is the same bottle.

Q. And you identify the bottle by what, forgetting about the cap? If you didn't have that cap on that bottle, Officer, could you state that that was the very same bottle, if the cap weren't on top? A. Could I state this is the same bottle if the cap was not on it?

72 Q. Yes? A. Honestly, no, because other bottles have the same writing.

Q. Thank you, Officer. Now, Officer Longo did something with one of the capsules, you testified? A. That is right.

Q. Did he replace that capsule in the bottle? A. Beg your pardon?

Q. Did he replace the capsule in the bottle? A. Yes, he did.

Q. And did he return the bottle to you? A. He kept the bottle.

Q. And what did he do with the bottle, if you know? A. I don't know what he did. I know what he said he did but I couldn't tell.

Q. In other words, that was the last you saw of the bottle that day, would you say, when you turned it over to Officer Longo?

A. When I turned it over to him I didn't see it anymore.

Q. When was the next time you saw the bottle? A. The next time I saw the bottle was when we went before the Commissioner.

Q. Officer, have you been in the premises, 902 4th Street, Southwest, before this incident? A. Before this incident?

Q. Yes? A. Had I been there before this incident?

73 Q. Yes? A. I would say over a period of years, I have.

Q. You have been there several times anyway? A. Yes, I have.

Q. You have been in that vestibule? A. I had been in there before.

Q. You have also been behind, let's say, the second door?

You have the front door and your second door which closes in?

A. The second door goes into the house.

THE COURT: You mean a residence where people live?

THE WITNESS: Yes, sir.

Q. All right. Now, as you open the second door, Officer, what is in there? A. I don't know. I didn't go in there.

Q. You have been in there before? A. I don't remember having gone in there before. I have been inside the vestibule.

Q. Only in the vestibule? A. That is right.

Q. You have never gone into past the second door? A. Not to my knowledge. I may have gone during the course of the years, but I don't remember.

74 Q. Could this incident have occurred at 904 4th Street, Southwest?

A. No, sir, it couldn't have.

Q. Why do you say that? A. Because over the top of the door the number "902" is written on the glass and transom.

Q. And yet, Officer, you say that you have never been beyond the second door at 902 4th Street, that you remember what is behind there? A. No. I don't know what is behind there.

Q. If I told you there is a stairway and a hallway behind that you wouldn't know that? A. I wouldn't know that because I never opened that door and gone inside.

Q. Now, Officer, I think you testified that you opened the door, and that as you opened the door Upshaw was behind the door and Collis was on the right?

THE COURT: Let's don't repeat. We have been over that several times, let's get through with this witness.

MR. WEEDA: All right, sir. I have no further questions.

Questions by Mr. de Chimay:

Q. Officer Burwell, you are familiar with the character of that neighborhood, are you not? A. I would say yes.

75 Q. You are familiar with the character of these doorways?

A. Some of them.

Q. You have seen people standing in front of them? A. Yes, I have.

Q. Have you seen people go in these doorways quite freely?

A. Yes, I have.

Q. Can you remember what the weather was on that day, whether it was windy or cold, warm, or what? A. I believe in the early part of the day it had rained, and at that time I believe the sun had come out.

Q. Was it windy or calm? A. I couldn't remember that part, sir. The only thing I can remember is that the sun was shining at that time.

Q. What is in front of 902, is it a loading zone, or --- A. It is a bus zone, bus stop.

Q. Would it be normal for anybody to go into that doorway at 902 while waiting for a bus?

MR. McLAUGHLIN: I object to this, Your Honor.

THE COURT: Yes, that calls for a conclusion and conjecture. Objection sustained.

Q. You say that Mr. Collis did not deny that it was his bottle?

A. Yes, he denied it was his bottle.

Q. Did you ask that question of Mr. Upshaw? A. I did. He denied that it was his bottle.

76 MR. DE CHIMAY: I have no further questions.

Questions by the Court:

Q. Do either of these defendants -- these defendants, or either of them, live in that house that you know of? A. They do not. I asked them on the scene if they lived there.

Q. Do they own any business there or have any interest in any business? A. No. No, sir, no business there.

Q. And this inside door opens into living quarters? A. That is right.

Q. It is not connected to this pool hall to the south? A. No, there are people living upstairs.

Q. But you are certain neither one of them lived there or have any interest in that address? A. At first Upshaw said that he lived there, and then he changed his story and said he lived at 344 K Street.

Q. Do you know where the other defendant lives? A. The other defendant gave his address as --

Q. All the Court wants to know is if either of them lived in that house? A. Neither of them lived there.

THE COURT: All right, that is all.

MR. McLAUGHLIN: That is all.

(Witness excused)

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77 MR. McLAUGHLIN: Officer Longo.

(While the Marshal was escorting the next witness to the witness stand, Mr. McLaughlin handed an object to the Clerk who marked same for identification as Government's Exhibit 1-A)

DAN A. LONGO,

a witness called by counsel for the Government, first having been duly sworn, in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. Your name is Dan A. Longo? A. Yes, sir.

Q. You are a member of the Metropolitan Police Department? A. Yes, sir.

Q. Are you assigned to any particular department? A. Assigned to the Narcotic Squad.

Q. Were you so assigned on January 2, 1956? A. Yes, sir, I was.

Q. On that particular date of January 2, 1956, did you have occasion to see Detective Burwell? A. Yes, sir, I did.

Q. Do you recall when and where you saw him? A. It was about 5:15 P.M. on that day in No. 4 Precinct.

78 Q. And No. 4 Precinct is located where? A. In the District of Columbia.

Q. I show you Government's Exhibit marked for identification

"No. 1" and ask you if you can identify that? A. Yes, sir, I can.

Q. All right, and you identify Government's Exhibit 1-for-identification as what? A. As the bottle containing the seven capsules and half a capsule, which Officer Burwell gave to me in No. 4 Precinct.

Q. On what date? A. On January 2nd, about 5:15 P. M.

Q. Did it contain those capsules at the time that you received it from Officer Burwell? A. Yes, sir.

Q. After you received Government's Exhibit marked for identification "1" from Officer Burwell on January 2nd, what did you do with it? A. I placed my initials on the cover, the top of the bottle, it is a plastic lid, and I performed a preliminary field test on one of the capsules that showed by positive color reaction the presence of a narcotic alkoloid of the opiate group.

Q. What did you do with the exhibit after you made the experiment? A. I then returned to the office of the Narcotic Squad, where I placed
79 it in a police property envelope, after first wax-sealing the lid to the bottle, I put it into the police property envelope, on which I put my name and date and the brief circumstances on it, and then I wax-sealed the police property envelope.

Q. Ishow you Government's Exhibit marked for identification "1-A" and ask you, can you identify that? A. Yes, sir, I can, by my name.

Q. You identify Government's Exhibit 1-A as what? A. As the police property envelope in which I placed the bottle and the seven capsules and the half-capsule into it.

Q. After you placed Government's Exhibit 1 into Exhibit 1-A, what did you do with 1-A? A. After wax-sealing it, I placed it in the office safe, and on January 5, 1956, I personally delivered it to the United States Chemist.

Q. Is there any difference in it today than when you turned it over to the chemist? 1-A (indicating). A. It was wax-sealed.

Q. 1-A, the envelope? A. It was wax-sealed and the lid was still intact.

Q. You didn't open it? A. No, sir, I didn't.

Q. And you turned it over to the chemist? A. Yes, sir.

80 Q. Doc Young? A. Yes.

MR. McLAUGHLIN: No further questions.

ON CROSS-EXAMINATION:

Questions by Mr. Weeda:

Q. Officer Longo, you testified that Officer Burwell gave you a capsule? A. A capsule? No, sir, I didn't.

Q. He gave you the bottle, is that right? A. The bottle and the contents, seven capsules and a half-capsule.

Q. Did he mark the cap of that bottle in your presence? A. No, I don't believe he did. It was already initialled.

Q. Initialled by whom? A. Officer Burwell, and there was another set of initials on the bottle also.

Q. Whose were those? A. I learned later that it was Officer Lucas's.

Q. But you saw those marks at that time? A. Yes.

Q. Both Officer Burwell and Officer Lucas' marks were on that cap? A. Yes.

Q. That was on January 2nd? A. Yes, sir.

81 Q. You are positive that Officer Lucas's marks were on there at that time? A. Yes, to the best of my recollection, it was.

Q. Did you see Officer Lucas mark that bottle? A. No, sir, I didn't.

Q. Can you look at that cap, Officer, and see if you see Officer Lucas's identification marks? (Indicating) A. I see several scratches on here. I can't make it.

Q. Try holding it up directly to the light, Officer. A. As I said, I see several scratches on the lid.

Q. Did you have that much difficulty, Officer, when you first observed the initials of Officer Lucas and of Officer Burwell on that cap on January 2nd? A. No, sir, I didn't. I see "H. B." (Indicating), there are some other marks on there.

Q. What kind of marks? A. There are some other marks.

Q. But you did see Officer Lucas's marks on the cap of a bottle on January 2nd? A. Yes, I did.

Q. But you can't identify them now, Officer? A. No, sir, I can't.

Q. In other words, then, Officer, would that be the same cap that you saw on January 2nd? A. Yes, it is because it has my initials on there.

82 Q. Do you customarily, or in this case, did you make any marking on the bottle itself, forgetting about the cap for an instant? A. Not to my recollection, no, sir.

Q. Officer, this scotch tape on this bottle (indicating), can you account for the fact that scotch tape is on that bottle? A. No, sir, I can't, although I recognize Dr. Young's initials on the scotch tape.

Q. Well, was that scotch tape on the bottle when you turned it over to Dr. Young? A. It may have been. I don't think it was, though.

Q. In other words, then, you placed no identification mark on the bottle itself, did you? A. On the lid I did, then I wax-sealed the lid to the bottle.

Q. Officer, you have here in the corner (referring to exhibit 1-A), is this your writing here? A. No, that is Dr. Young's writing.

Q. He wrote your name? A. Right there (indicating), and I wrote it down here (indicating).

Q. But this is not your writing up here? (Indicating) A. No, sir.

Q. But it is your name, "Longo"? A. It is my name, yes, sir.

Q. You say that you returned the bottle to the Narcotics Officer

83 after you made your field test? A. Yes. I took the bottle and the contents back to the office of the Narcotic squad.

Q. Who was that, who would that be? A. I don't understand.

Q. The officer that you took the bottle back to? A. No, I took the bottle myself to the Narcotic Squad Office and wax-sealed it.

Q. Excuse me, you didn't turn it over to anyone after it was in your possession? A. I turned it over to Dr. Young on January 5th.

Q. You didn't turn it over to any other officer? A. No, sir.

Q. And do you know, Officer, when the seal was broken on this envelope? A. It had to be on January 5th or a later date. I can't say.

Q. Why do you say January 5th or a later date? A. Because I delivered it to the United States Chemist on January 5th and it was intact at that time.

Q. And it was in the safe in the Police Department from January 2nd to January 5th? A. In the safe of the Narcotic Squad.

Q. Where is that located? A. 300 Third Avenue, Northwest.

Q. Did you appear with Officer Lucas and Officer Burwell at the time of the hearing in this case before Commissioner Cyril S.

84 Lawrence? A. Yes, sir, I did.

Q. And you were in the presence of Officer Burwell and Officer Lucas? A. At which time, sir?

Q. At the time of the hearing, or say just before the hearing? A. I don't recall. I may have been.

Q. Do you recall that Officer Lucas put his identification marks on the cap of that bottle? A. No, sir.

Q. Then, as far as you know, those identification marks of Officer Lucas were on that cap at the time that Officer Burwell on January 2nd gave you that bottle? A. If I may answer the question as to what day that hearing was, I don't recall.

Q. January 24th. A. No, sir, the bottle would not have been there, to my knowledge.

Q. The bottle was not --- A. There.

Q. At the Commissioner's hearing? A. That is correct, sir.

Q. Well, where was the bottle at that time? A. I couldn't answer that. I imagine in the custody of Dr. Young, I don't know.

85 Q. Was it in the possession of Officer Burwell at the Commissioner's hearing? A. Not to my knowledge.

Q. Was it in the possession of Officer Lucas at the time of the Commissioner's hearing? A. Not to my knowledge.

Q. Did you see it at all on January 24th before the hearing, during the hearing, or immediately following the hearing? A. Not to my

knowledge, no, sir.

Q. Well, when is the next time that you saw the bottle after that Commissioner's hearing, Officer?

MR. McLAUGHLIN: Your Honor, he said he didn't see it.

THE COURT: He said he didn't see it after the Commissioner's hearing. It wasn't there and he assumed it was with Dr. Young.

A. Well, the last time I saw the bottle until this date to the best of my recollection was on January 2nd, at which time I put it in the police property envelope and then delivered it to the United States Chemist on January 5th.

Q. You never did see Officer Lucas put his marks on that cap, did you? A. No, sir, I didn't.

Q. But you have seen those marks on the cap? A. As I just testified, I see several marks on there.

86 Q. Can you identify them as Officer Lucas's at this time?

A. No, sir, not very well. I recognize "H. B."

Q. And, now, on January 2nd, you testified you saw Officer Lucas's marks on that cap? A. Yes, sir, what appeared to be Officer Lucas's initials.

Q. Well, are they on this cap, Officer? A. As I testified, there are several markings on there, although I can't make out several of them. There is an "L" here (indicating) but I can't make out the first initial, before the "L".

Q. Does that look exactly now as it did to you on January 2nd, Officer? A. I can't recall that.

Q. But you do recall seeing both initials of Officer Lucas on January 2nd on the cap? A. Yes, sir, sure I did.

Q. You don't see them now, do you, Officer? A. No. As I said, there is an "L", although I can't make out the letter preceding the "L".

Q. Could it be, Officer, that that is a different cap? A. No, sir, because there's my initials right here on the side (indicating).

MR. WEEDA: No further questions of this witness, Your Honor.

MR. DE CHIMAY: No questions.

87 ON REDIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. You say you sealed the top of that cap to the bottle? A. Yes, sir.

Q. With this wax? A. Yes, sir, with wax.

MR. McLAUGHLIN: That is all.

(Witness excused)

MR. MCLAUGHLIN: Call Dr. Young.

DR. JAMES L. YOUNG,

a witness called by the Government, first having been duly sworn, in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. McLaughlin:

Q. Your full name is what? A. James L. Young.

Q. And Mr. Young, you are employed where? A. U.S. Treasury Department.

88 Q. And employed in what capacity? A. As a chemist.

MR. McLAUGHLIN: Will you stipulate as to his qualifications?

MR. WEEDA: We certainly do. I cannot speak for co-counsel.

MR. DE CHIMAY: We also stipulate.

Q. I show you Government's Exhibit marked for identification "1-A" and ask you if you can identify that? A. Yes, I can.

Q. And you identify the exhibit marked for identification "1-A" as what? A. This is an evidence envelope which was handed to me by Officer Dan Longo of the Metropolitan Police Narcotic Squad on Thursday, January 5, 1956.

Q. Is there any difference in its condition today than when you received it on January 5th from Officer Longo? A. Yes, there is.

Q. What is the difference? A. At the time that I received the evidence envelope, it was wax-sealed and it was intact.

Q. All right, and who opened it? A. I cut it open personally.

Q. Now, at the time that you cut Government's Exhibit 1-A open did it contain Government's Exhibit 1? A. Yes, it did.

89 Q. All right. What did you do with Government's Exhibit 1 after you removed it from Government's Exhibit 1-A? A. Government's Exhibit 1 was likewise wax-sealed. I opened the bottle by taking off the plastic cap and found it to contain seven capsules containing a white powder; and, in addition, a half of an empty capsule.

Q. All right. Did you make any analysis of those capsules? A. Yes. I individually analyzed the contents of the capsules and found each of them to contain heroin hydrochloride, a narcotic drug and derivative of opium, quinine hydrochloride, milk sugar and mannitol; and the net weight of the contents of the seven capsules was seven and a half grains.

Q. Doctor, in regards to Government's Exhibit for identification "1", you say that was turned over to you by Officer Longo on January 5th of 1956? A. That is correct.

Q. And where has that exhibit been since that time, January 5, 1956? A. After analyzing the contents of Government's Exhibit 1, the exhibits were re-assembled, and they were placed in my personal safe in the Bureau of Internal Revenue Building here in the District of Columbia, and they remained there until they were brought here and turned over to you, Mr. McLaughlin, yesterday at the time of this trial.

90 Q. In other words, it is the first time they have been out of your custody since January 5th? A. That is correct.

MR. McLAUGHLIN: That is all.

ON CROSS-EXAMINATION:

Questions by Mr. Weeda:

Q. Dr. Young, on January 24th of 1956, would that bottle containing those capsules have been in your possession on that day? A. It was in my possession continuously, that is, in my constructive possession, being locked in the safe until yesterday when it was brought here at the time of the trial.

Q. On January 24th, or about that time, or any time after the time you received it, until the time you were requested to bring it here, did Officer Lucas ask you for that bottle? A. Officer Lucas?

Q. Yes, sir? A. I am afraid I don't know Officer Lucas.

Q. And Officer Burwell, when did he ask you for that bottle?

A. No, no one asked me for the bottle at any time.

Q. It never went out of your possession at any time? A. Not

91 until yesterday when it was brought here at the time of the trial.

MR. WEEDA: No further questions.

MR. DE CHIMAY: No questions.

THE COURT: Is the Court and the jury to understand that that bottle now before you has been in your possession at all times between January 5, 1956 and yesterday?

THE WITNESS: That is correct, sir.

THE COURT: You may stand aside.

MR. McLAUGHLIN: May this witness be excused?

MR. WEEDA: I have no objection.

THE COURT: Yes, excused finally.

(Witness excused)

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MR. McLAUGHLIN: The Government will offer in evidence Government's Exhibits 1 and 1-A, and rests its case.

THE COURT: All right, the exhibits will be admitted in evidence. The Government rests. What does the defendant say?

MR. DE CHIMAY: I would like to make the customary motion.

92 MR. WEEDA: I did want to argue against the admission of that particular evidence, if Your Honor will permit me.

THE COURT: The Court will let you make a statement, or object if you want to object.

MR. WEEDA: I want to make a motion. May I approach the bench?

THE COURT: Yes.

(At the bench:)

MR. WEEDA: I make an objection, Your Honor, and a motion to disallow the admission of this evidence, Government's Exhibits 1 and 1-A.

THE COURT: Objection and motion overruled, to which, I take it, both of the defendants except.

MR. WEEDA: Yes, sir.

MR. DE CHIMAY: Yes, sir.

THE COURT: Let the record so show.

MR. WEEDA: I want to make a motion for judgment of acquittal for this reason, Your Honor: As far as the essential elements of both of these crimes are concerned, the Government has proved none of the elements. They are apparently relying only on one thing, as I can see, and that is the fact of possession. I think if possession isn't established here that the Government has no case. There has been no evidence of a sale, or distribution, or disposing, or --

93 MR. McLAUGHLIN: They are not charged with that.

THE COURT: They are charged with the possession. That is the question for the jury, based on the facts and the circumstances, so the Court thinks there is sufficient evidence to let the case go to the jury because that is a matter of fact that the jury can pass on, so the motion is overruled. I take it both defendants join in the motion. You join with him?

MR. DE CHIMAY: Yes, I do.

THE COURT: To which both defendants except, I take it?

MR. WEEDA: Yes, sir.

MR. DE CHIMAY: Yes, sir.

(End of bench conference.)

THE COURT: Counsel for defendants will now make their opening statements.

MR. WEEDA: Ladies and gentlemen of the jury, the defense, as far as the defendant Peter Collis is concerned, will be this: That Mr. Collis at no time ever had possession of that bottle which has been put into evidence by the Government as Exhibit 1; that he was familiar with the neighborhood and had lived there, so it was nothing uncommon for him to be there; that several days before this incident he had done some electrical wiring in the ten hundred block of Fourth

94 Street, Southwest, where he met the defendant Upshaw and Upshaw had assisted him in that electrical work. That was on December 31st. On January 2nd, we will show that Mr. Collis was on his way to Southwest to go visit his father at John's Delicatessen; that as he got to the corner of 4th and G Streets he noticed his father's business was not open. He remembered that where he had done this work at the ten hundred block of Fourth Street, Southwest, in the restaurant, that he had left some tools there; that he then proceeded to walk towards the ten hundred block of Fourth Street, Southwest, when he was called or hailed by the defendant Upshaw in the 900 block of Fourth Street, Southwest. He saw the officers. He recognized them and he waved at them. He went by and the defendant Upshaw asked him to come into this building or into this vestibule; that the defendant Collis knew nothing about, had no reason to know any definite reason why Mr. Upshaw had called him, and then, as the officers approached, the defendant Collis had nothing on his person at any time, and that he never had possession or ownership or custody or control of this bottle. I speak for the defendant Collis. When we show you, ladies and gentlemen of the jury, that Mr. Collis had no possession, no custody, or no control, no supervision of this bottle, in fact, when he entered these
95 premises didn't even know that such a bottle existed; then I will ask you, ladies and gentlemen, to find the defendant Collis not guilty.

THE COURT: All right, Mr. De Chimay.

MR. DE CHIMAY: Ladies and gentlemen, on the 2nd of January, at 3:45 P.M., or thereabouts, my client, Mr. Upshaw, was at 902 4th Street waiting for a bus to go uptown. Mr. Collis passed by, and, as you have just heard, and as we will testify, Mr. Upshaw and Mr. Collis had worked together the Saturday previous and Mr. Upshaw wanted to talk to Mr. Collis about this job and called him over. Suddenly, the police arrived, called them out of there, and found in that doorway a little vial of narcotics. My client, Mr. Upshaw, never saw that bottle before, never had it in his possession, never touched it, never knew anything about it. He has denied any knowledge or any

possession of that thing; so, there is no way he could have had possession of that thing or have facilitated the concealment and sale of it, if he didn't know anything about it; if he didn't have it in his possession there is no charge and, therefore, you should find him innocent.

THE COURT: Ladies and gentlemen, you will bear strictly in mind the instructions heretofore given you about not discussing the case until you have heard all of the evidence, the charge of the Court,
96 and the argument of counsel. We will now take our morning recess of ten minutes.

A recess was then had from 11:20 A.M. to 11:30 A.M. the same day, May 9, 1956, at which time proceedings were resumed as follows:

MR. WEEDA: We will call as the first witness the defendant, Peter Collis.

PETER T. COLLIS,

one of the defendants, was then sworn as a witness in his own behalf, and testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. Weeda:

Q. Mr. Collis, I want you to speak loud enough so that I can hear you, and the members of the jury, the last juror there, can hear you, and also Mr. McLaughlin. Keep your voice up at all times. What is your full name? A. Peter T. Collis.

Q. How old are you, Mr. Collis? A. Thirty-four.

Q. And where do you live? A. 7000 New Hampshire Avenue,
97 Tacoma Park, Maryland.

Q. Were you residing at that address on the date of January 2, 1956? A. Yes, sir.

Q. With whom do you live there? A. My sister and five nephews.

Q. Are you employed now? A. Yes, sir.

Q. And who do you work for? A. Collis Electric Company.

Q. And who is the owner of Collis Electric Company? A. My brother.

Q. Where is that business, where is the office of that business located? A. 5424 Third Street, Northwest.

Q. And what kind of work is the firm engaged in? A. Electrical contracts, wiring, and so forth.

Q. Are you an electrician? A. Yes, I am an apprentice electrician.

Q. And how long have you been, say, apprentice electrician? A. For the past six years.

Q. Prior to January 2, 1956, were you employed by the same firm? A. Yes, sir.

Q. Mr. Collis, did you serve in the United States Army? A. Yes, I have.

98 Q. When was that? A. From '42 to '46.

Q. And where was your service?

MR. McLAUGHLIN: I object to this, Your Honor.

THE COURT: Yes. You don't want to go into detail about that. The Court permitted you to say he was in the Service.

Q. What kind of a discharge did you receive from the United States Army? A. Honorable Discharge.

Q. When did you get out of the Service? A. January, 1950 -- '46, I am sorry.

Q. And after you got out of the Service where did you go to live? A. 629 4th Street, Southwest.

Q. How far away is that from 902 4th Street, Southwest? A. It is approximately a little over two blocks.

Q. And with whom did you live, if anyone, at 629 4th Street, Southwest? A. With my sister and nephews.

Q. And anyone else? A. My brother, young brother.

Q. And how long did you live at 629 4th Street, Southwest? A. I lived there approximately six years.

99 Q. Did your father have a business in that vicinity? A. Yes, at the same address, and I lived upstairs. His business is downstairs.

Q. What was the name of the business that your father owned? A. Collis Delicatessen.

Q. And what kind of business is he engaged in? A. Well, he sells groceries, meats, vegetables, and so forth.

Q. Did you ever work for your father in that store? A. Yes, I have.

Q. Are you well acquainted with the neighborhood, say between the 600 block and the ten hundred block of 4th Street, Southwest? A. Yes, I am.

Q. And where were you employed when you were living at 629 4th Street, Southwest? A. At my father's place. I was working for my father at the time.

Q. Did you do any other work? A. Well, like I do now. Sometimes I'd work, you know, a lot of people know me and they call me to do a few repairs in the electrical line.

Q. Please keep your voice up a little higher. While you were living in Southwest did you ever become acquainted with Officer Burwell or Officer Lucas? A. Yes, I have.

100 Q. And how was that? A. Well, mostly Officer Burwell, he used to come in my father's place more often. He used to sell some kind of magazine, you know, Boy's Club Magazines, and sometimes he came in there, you know, to sell an ad, and I have seen him in the neighborhood, like other businesses there, and we talk, you know, him and the owner of the place.

Q. Did you answer as to both Officers Burwell and Lucas. I want you to keep your voice up because I couldn't hear the last few sentences. A. Well, like I said before, I have known both officers, mostly Officer Burwell. I have spoke to him personally, you see. Now, Officer Lucas, I have seen him a lot, like he come by the place and said good morning, or something like that.

Q. Now,prior to January 2, 1956 -- strike that. In your employment with Collis Electrical Company prior to January 2, 1956, did you receive compensation? A. Compensation?

Q. Well, were you paid for your work? A. That day?

Q. No, excuse me. Listen to my question. Prior to January 2nd you worked for Collis Electric Company, you testified? A. Yes -- you mean before?

101 Q. Before January 2nd. A. Yes.

Q. Were you being paid for the work that you did for Collis Electric Company? A. Oh, yes, I have.

Q. On January 2, 1956, were you working on that day at all? A. No, I believe we were off that day.

Q. What is that? A. I remember that New Year's fell on Sunday and the boss decided to let us off on Monday, which was the 2nd.

Q. Now, prior to January 2nd did you have occasion to do any electrical work in the Southwest? A. Yes, I did.

Q. And where was that? A. It was at the ten hundred block, Fourth Street, Southwest. I believe, if I remember correctly, the number is at 1014 4th Street, Southwest. The name of the place is "Jordan's Grill", I am not sure about it.

Q. Jordan's Grill? A. That is what I think it is.

Q. Will you explain how you came to do some work there? A. Yes. One day I went there, I think I went to the Safeway close by there, and then I went there, I don't remember correctly, it was either hot dogs or a couple of chickens that I went to get and --

Q. Before you go further, can you establish what date that was?

102 A. Around, I would say between the 26th and 28th, something like that, of December. I am not quite sure what date it was.

Q. Then what happened? A. Well, this lady, I was talking to her husband in Greek --

Q. Let me interrupt you again. When you say "this lady", to whom are you referring? A. That is the owner, I learned later is the wife of the owner of the place.

Q. What is the name of the owner? A. I believe his name is --

Q. What is the name of the lady? A. Marlene, I believe, is the first name. The last name is Bassilikos, something like that.

Q. Bassilikos? A. Yes.

Q. Of your own personal knowledge, do you know if they are of Greek descent? A. Yes. I am Greek myself, and I spoke with them--

Q. You are Greek yourself? A. Yes, I am Greek.

Q. Then what happened that day in the restaurant? A. I noticed a couple or three fixtures were out of order in the place of business there, and the wife of Mr. Bassilikos was telling him in Greek that she thought she was going to get somebody to fix those fixtures, so then
103 I told her that I was looking for work, and I was going to make a phone call and somebody was in the phone booth and I got a coca cola and I believe I got some chewing gum, and so then I interrupted them, I told Mr. Bassilikos that I do that kind of a work, that is my job, and if he would like, that I overheard what he was talking about, you know, with his wife, and if he would like for me to do the work on my spare time. I told him he would save a little money, that I would do it in my spare time, so he asked me roughly, you know, how much it would cost, how much I thought it would cost, so I told him between twelve and sixteen dollars, I didn't know exactly. I had to change some of those fluorescent fixtures and I didn't quite remember the price of the fixtures, so I told him I would give him a figure of between twelve and sixteen dollars; so he told me when I can do it, so I told him, I says, "Maybe tomorrow, maybe a couple of days. Like I told you, I work every day. I'll do it when I get a chance, either get off early or it has to be Saturday or Sunday." He says it's all right and so he told me to go ahead and do it. Now, I think ---

THE COURT: I don't believe it is necessary to go into so much detail. He got the job and he did the work.

Q. One other question. This conversation that you overheard
104 between Mr. and Mrs. Bassilikos, was that in English? A. Half English and Half Greek.

Q. Now, did there come a time, after you talked with Mr. and Mrs. Bassilikos, that you went back to that restaurant, Jordan's Restaurant, to do any work? A. Yes, sir, after that I went back to do the work.

Q. When was that? A. I believe it was the 31st of December.

Q. All right, now, what did you do? A. Well, I took the bottom of the fixtures down, took the tubes off the fixtures, and the bottom of the fixtures, and I took down the balance, the defective balance.

Q. While you were there did you see anyone? A. Yes, I did.

Q. Who did you see there at that time? A. Well, I have seen quite a few people come in and out, and I also saw Mr. Upshaw over there.

Q. Did you have any conversation with Mr. Upshaw on December 31st in that restaurant? A. Well, when he came in I was on a step-ladder, and he said "Hi". I said "Hi". So, he sat about a couple of stools from the stepladder where I was up. So, I am taking the tubes down, you see, I think I took two or three tubes down at once so he noticed that I needed help and he says, "Here, let me." - you know, put them down so I won't have to get down from the stepladder. I says all
105 right, "I appreciate it, put them on the counter." So he did. Then I took the rest of the tubes down and I handed them to him. I saw he was willing to give me a hand.

Q. Mr. Collis, excuse me. Did you finish the job? A. Yes. I did the job.

Q. Did you get paid for the job? A. Yes, I did.

Q. Was Upshaw there any period of time with you? A. Well, he was there 'til I got through.

Q. About when was that, would you say? A. What time you mean?

Q. Yes? A. It was in the afternoon. I don't remember the time exactly.

Q. Did you get paid for this job? A. Yes, I did.

Q. I am going to show you this paper writing and ask you if you have seen that paper writing before? A. Yes, sir, that is my writing.

Q. And what does that say, Mr. Collis? A. "Electrical repairs at 1014 4th Street, Southwest, amount $13.50; date 12/31/55; total $13.50 paid in full, Peter T. Collis."

MR. WEEDA: Your Honor, I want to have this marked as Defendant Collis' Exhibit No. 1 (indicating).

106 Q. Did you write that out yourself? A. Yes.

Q. When did you write it? A. Same day that it is on there.

Q. December 31st? A. Yes, sir.

Q. Did you see Mr. Upshaw that night? A. That night?

Q. Or after you finished that work that night? A. No, I did not.

Q. On January 2, 1956, will you tell us what happened on that day? A. Well, I was off that day and ---

Q. Excuse me. What do you mean by you were "off"? A. We didn't work that day. The first of the year fell on Sunday so the boss decided to give us off on Monday, which was the 2nd.

Q. And did you go anywhere on that day? A. Yes, I did.

Q. Where did you go? A. Went down Southwest, went down to see my father, as I usually do.

Q. And how did you get down to Southwest? A. By a bus and street car.

Q. In what order? A. Well, I caught a bus and went to the District, you know, at Tacoma Park, and I came to the District line, and

107 from there I caught a bus again and I went down to 7th and New Hampshire, Georgia Avenue and New Hampshire, and I transferred from the bus to a street car and I went down toward Southwest.

Q. Where did you get off the street car, at what street did you actually get off the street car? A. The last time?

Q. Yes? A. At 7th and G, Southwest.

Q. About what time was that? A. I would say about 3:30, roughly. I really don't remember. It happened so long.

MR. WEEDA: If Your Honor please, might I use the board again to draw a diagram of the streets?

THE COURT: Yes, I think so.

Q. (Referring to board) Now, Mr. Collis, I have put on the board, 4th Street, Southwest, with the intersecting streets, F, G, H, I, K, L. Between G and H is the 700 block; between H and I is 800 block;between

I and K the 900 block; and between K and L is the 1000 block. Now, you got off the street car where, at 7th and G? A. 7th and G.

Q. And in what direction did you proceed? A. Towards down to Fourth Street, Southwest.

108 Q. From 7th to 4th? A. That is right.

Q. Now, you see, here is G Street. Where is your father's delicatessen located from this point? (Indicating) A. Right across from there.

Q. That is in the 600 block? A. Yes.

Q. And it is across the street from here? (Indicating) A. Yes, sir.

Q. You arrived at this point, at the corner of 4th and G? A. Yes, sir.

Q. And did you go to your father's delicatessen? A. When I arrived at the corner ---

THE COURT: A little louder.

A. When I arrived at the corner of 4th and G, Southwest, my father's place is right direct from 4th and G on the west side corner, and I noticed he was closed. He has neon signs at the windows, and lights, and from experience I knew his place was closed.

Q. And did you go to your father's delicatessen? A. I did not go across the street, no.

Q. Then what did you decide to do? A. Well, I decided while I was down Southwest, I left a couple of tools where I do the work, it wasn't nothing really valuable, but being as I was down Southwest I decided to go down and pick them up. I didn't think that the people

109 would have them for me. I left them -- and they had a pinball machine and I left them on the pinball machine, so I figured with all the people going in and out probably some kid, you know, picked them up. I figured I didn't have anything else to do anyway, it wasn't that far to walk anyway.

Q. What kind of tools did you leave there? A. Well ---

Q. Do you recall what they were? A. Yes. I left a screwdriver and a pair of pliers.

Q. Where did you proceed from 4th and G Streets, Southwest? A. From 4th and G I crossed over on the east side, west side of the street.

Q. This way? (Indicating) A. That is right.

Q. Then where did you go? A. Then I continued walking down towards this side, towards H Street.

Q. All right. A. Then across H Street.

Q. In the center of the block? A. On the west side.

Q. You mean between H and I, or between G and H? A. I crossed H Street, and I got on - in other words, I came to H Street, which I crossed on the 800 block.

110 Q. Here? (Indicating on blackboard) A. Right about there some place.

Q. All right (indicating) -- A. Wait a minute. I haven't crossed yet.

MR. McLAUGHLIN: He is still on this side of the street.

Q. All right, I am sorry. Then what did you do? A. When I came down I would say about five or six doors on the 800 block I heard somebody shout at me.

Q. About where were you at that time? A. There is a pool room there, or something, and a private home; and another store, or something, I don't know.

Q. Let me ask you this. Assuming this is the center of the blcok (indicating) -- A. I was not quite at the center.

Q. Let me finish, listen to my question. Were you north of the center or south of the center? A. I was north of the center.

Q. Then what did you do, you say you heard somebody call? A. Yes.

Q. Who called you? A. I turned around and I saw Upshaw standing at the corner of I Street.

Q. Which corner of I Street, right here? (indicating) A. All right, on that corner, as you are going south.

111 Q. As you are going south? A. Right up over there some place.

Q. This corner? (Indicating) A. Yes. So I heard somebody shout and I turned around, and he was going like that (indicating), and I pointed to myself and he says, "Yes, come on."

Q. All right. Then what did you do? A. Then I started crossing G Street towards this side.

Q. Like that? (Indicating on blackboard) A. Yes. When I was about fifteen or so feet from the curb I noticed Officers Lucas and Burwell start moving up.

They were parked -- there is a theater there and they were parked outside the theater.

Q. Is that the Jewel Theater? A. Yes, the Jewel Theater. So I rushed a little bit to get out of the way.

Q. Why did you do that? A. They were starting moving already, so I didn't want them to think I ignore them, so I rushed, I stepped up my pace a little bit and at the same time I turned around and I says "how do you do". I waved at them.

Q. Why did you do that, Mr. Collis? A. Well, I know them. I know both officers.

Q. Did they do anything in response to the fact that you waved at them? A. Well, Mr. Lucas kind of laughed back at me, you know,
112 shook his head, and I think Mr. Burwell maybe did so. I don't know. I couldn't see very well Mr. Burwell's face.

Q. Now, you had crossed the street in the 800 block and you were on the east side of the street? A. Right.

Q. Where did you go from there? A. Well, I continued walking towards down I Street, where Upshaw called me from. By the time I got at the corner there ---

Q. Which corner? A. Before I crossed I Street, I noticed Upshaw was gone, I couldn't see him.

Q. Then what did you do? A. I continued walking to go down there to where I started to, you know, the restaurant.

Q. Let me ask you this question, where is the restaurant located

that you were going to do the work, that you wanted to go back to get your tools? A. The restaurant is on the ten hundred block.

Q. On which side of the street, the west side or the east side? A. The east side.

Q. Is it about here? (Indicating) A. Somewheres around the center.

Q. All right. This is the restaurant here? (Indicating) A. Yes.

113 Q. All right. You were at the corner of I Street? A. Right.

Q. Then what did you do? A. I started crossing I Street. You know, I started walking towards the restaurant, as I said before. When I passed, I went, I don't know exactly how many feet, maybe thirty-five or forty feet from the corner, I heard a man shout back at me again and I turned around and it was Upshaw by the doorway there, outside a door.

Q. I want to ask you one question. This is the 900 block of I Street (indicating), what is on the corner there, do you recall? A. There is a liquor store.

Q. That is the first building, that is 900? A. Yes, sir.

Q. Then the next building would be 902? A. 902.

Q. Then 904 and 906 (indicating). Now, where were you when you say Mr. Upshaw called you from here? (Indicating) A. I was about ten or twelve feet from 902.

Q. Were you beyond 902? A. Yes, sir, going south.

Q. And you were proceeding where? A. To the ten hundred block, to Jordan's Grill.

Q. What did you do after you saw Mr. Upshaw call you? A. Well, I turned around and he went like this (indicating), so I started walking

114 towards where Upshaw was. In the meantime --

THE COURT: Keep your voice up.

A. Well, I started walking towards where Upshaw was by the doorway and he started going in, in the house, so he tells me, he says, "Come in here", he said, "It's cold."

Q. Now, Mr. Collis, what kind of a day was it? A. Well, it was rather cold. I had my coat on and sweater on.

Q. All right. Continue. A. So I followed Upshaw into the house.

Q. What address was that? A. Well, I thought it was 904 but now they tell me it is 902, I don't know.

Q. 902, you followed him in there, you say, into 902? A. Yes.

Q. What kind of a doorway is that? A. Well, it is a door, I think it is two doors. The front door is not -- I don't think they use the front door. Now there is another door farther back from the front door.

Q. Did you walk into the vestibule? A. No, I did not. You mean-- what is the vestibule?

Q. The vestibule would be this portion, the space between the first and second doors (indicating). A. Yes, I walked in there.

115 Q. And was Mr. Upshaw there? A. Yes.

Q. What, if anything, occurred in that vestibule between you and Mr. Upshaw, or what conversations did you have? A. Well, Upshaw, when I got in the vestibule, like you call it, Upshaw continued to -- he opened the door, you see, to go farther back, so I really didn't know what he wanted. He called me, I don't know, I thought he wanted to sell me something, I don't know, but anyway, I told him, I says, "Where are you going", you know. He says, "Come on, come back here."

THE COURT: A little louder.

A. He says, "Come behind the door, I want to show you some thing." So I says, "What you want to show me?" So, I believe the door opens inward. He got in and pulled the door to him but I stayed, you know, facing the door, part of the door and part of Upshaw, you see. So I asked him, "What did you want?" He says, he tells me, he says, "I got a few things here", he says. He says, "You are interested?" So I looked, so I noticed what it was, so I told him, "No, thanks, I don't use the stuff no more."

Q. I show you, Mr. Collis, Government's Exhibit 1 in evidence and ask you if you in any way can identify that bottle, or remember having seen that bottle before? A. Well, I have seen something like it.

116 Q. And where did you see something like it? A. Well, a bottle Upshaw had looked something like this. He wanted to show it to me like this (indicating) in his hand.

Q. Did you know whether there was anything in the bottle? A. Well, I noticed something was in there, yes. I didn't know what it was, aspirins or whatever it was, but I had a pretty good idea what it may have been.

Q. What did you say to Mr. Upshaw? A. I told him, "No, that's---"

THE COURT: Let's first get what did he say, I didn't follow you then.

A. He says, "I got a few things, and it's cold. I have a few things left, I am trying to get rid of it so I can go home, it's cold." So I told him, "No, I am not interested, I do not use the stuff no more."

Q. Mr. Collis, you said you do not use the stuff anymore. Did you not plead guilty to a charge of possession of narcotics back in 1953? A. Yes, I did.

Q. Were you ever a user of narcotics? A. Yes, I have been.

Q. On January 2, 1956, were you a user of narcotics then? A. What date, sir?

Q. January 2, 1956, the date of this incident. A. No, I was not.

117 Q. Now, Mr. Collis, what was your answer in response to my question as to what you said to Mr. Upshaw? A. I told Mr. Upshaw, I said, "No, thanks, I do not use that stuff no more." That is the very words I told him.

Q. Had you seen Mr. Upshaw in the neighborhood prior to the time that he had helped you work in the restaurant? A. Yes, I have seen him usually around the corners there on G Street, up and down the street. Yes, I have.

Q. Then what happened after your answer to Mr. Upshaw, what did you do? A. I started to go, and when I walked away from Upshaw, I don't quite remember how many steps ---

Q. Keep your voice up. A. I started to go and so I was going out the vestibule and Officer Burwell come in and grabbed me and he

said, "What you doing there?" At that time I don't think he saw Upshaw, you see, because --

Q. Don't tell us what he thinks because you don't know what the officer thought. A. Anyway, he started searching me. He says, "Raise your hands." I put my back against the wall, the south wall, my back was facing south, and he searched me.

Q. Then what happened? A. While he was searching me, Officer Lucas walked in, and as Officer Lucas walked in I heard something drop, you know --

118 Q. From what direction did it come? A. From the back to my right, towards where Upshaw was, where I left Upshaw.

Q. Do you know what it was that dropped? A. No, I do not.

Q. What, if anything, did Officer Lucas do at that time? A. Well, at the same time I heard the noise of something drop, Officer Lucas said, "Wait a minute."

Q. Then what did he do? A. "Wait a minute," he says. So, he goes in the back and gets Upshaw out of the way, and he go behind the door, then he comes out with a bottle that looks the same thing I saw in Upshaw's hand.

Q. I show you this bottle again, Government's Exhibit 1 in evidence, is that in any way similar or look like the bottle that Officer Lucas had in his hand? A. Well, it does look like the bottle that Mr. Lucas had in his hand.

Q. You say Officer Burwell searched you? A. Yes, sir.

Q. What kind of a search did he make -- let me withdraw that question. What did he actually do when he searched you? A. Well, truthfully speaking, he didn't really, you know, thoroughly search me, but, you know, he put his hand in my pocket here, up here (indicating).

119 He didn't bother, you know, he just went like this (indicating), and my pocket, my pant pocket, and my legs.

Q. Did he take anything from you? A. Well, at the time he took something out of my pocket, but I put it back. I think I had some kind of a business card, a little change, and coins.

Q. How much money did you have on you at that particular time? A. If I remember correctly, I had something like $1.60 or $1.75, I think it was, in change. It was close to two dollars in change.

Q. That is all the money you had? A. Yes.

Q. When they took you to the precinct, did they make a search there? A. Yes, and they put everything on the desk there. I didn't have a wallet. I forgot my wallet at home, so I didn't have much papers. I had a couple of business cards, I believe, with me, and that change, and a cigarette lighter; and I believe I had a car token or two.

Q. They found nothing else on your person? A. No, sir, that is all.

Q. Did there come a time when you did go to the restaurant in the ten hundred block of 4th Street, Southwest, subsequent to January 2nd?

120 A. Yes.

Q. Can you identify this instrument I have in my hand which is commonly called a screw-driver?

MR. McLAUGHLIN: I will have to object to anything that happened subsequently to the date in question.

THE COURT: Yes, it is subsequent to the event and the Court doubts the materiality.

MR. WEEDA: May I say this, that he did testify that he left some tools there.

THE COURT: All right, just ask him if he later recovered the tools.

Q. All right, did you later recover your tools? A. Yes.

THE COURT: That answers it.

MR. WEEDA: All right, Your Honor.

Q. Did there come a time when you moved from 620 4th Street, Southwest? A. Yes. I moved from there to where I live now at 7000 New Hampshire Avenue.

Q. When was that? A. I think it was in '51 or '52, I don't remember very well.

Q. I want to show you this bottle again. Did you ever own this bottle or the contents? A. I did never own that.

121 Q. Did you know when you walked into the premises, 902 4th Street, Southwest, what the defendant Upshaw wanted? A. No, I did not.

Q. Did you agree to buy anything from Upshaw? A. No, I did not.

Q. Were you a dope user in the month of December, 1955? A. No, I was not.

Q. Isn't it a fact that you went to Lexington, Kentucky, sometime before that? A. Yes.

Q. When was that? A. It was March, 1955.

Q. And you were there for how long? A. I came out in August, '55.

Q. Since that time had you used dope, between the time you got out of Lexington and the 2nd of January of 1956? A. I did not.

MR. WEEDA: I have no further questions.

THE COURT: You mean you were in the Federal Penitentiary at Lexington, or the hospital?

THE WITNESS: Yes.

MR. WEEDA: Your Honor, that is the hospital.

THE COURT: All right, let's get along and get through with this witness.

MR. DE CHIMAY: Go ahead, Mr. McLaughlin.

MR. McLAUGHLIN: No, you go ahead.

122 ON CROSS-EXAMINATION:

Questions by Mr. De Chimay:

Q. Mr. Collis, you made the statement to the effect that you went in the doorway at 902, did you not, with Mr. Upshaw? A. Not in the door. I followed Upshaw to the door.

Q. And you did not go inside of the door? A. I went -- he pulled the door towards him, the door opens inwards, so I stepped, like he was holding the door, I was in front of the door, and the door was still in front of me and Upshaw.

Q. Well, were you inside of the doorway? A. I put my right foot in so I can bend to talk to him, you know, to see what Upshaw wanted.

Q. You mean the door was closed between you and Mr. Upshaw? A. It was not closed, no.

Q. Did you at any time say that the events here occurred at 904 rather than 902? A. It could have been.

Q. You are not too sure? A. I am not too sure, no, sir.

Q. Now, you say you heard something drop? A. Yes, I did.

Q. When did that happen? A. When Officer Burwell was searching me.

Q. In other words, you were outside in the doorway then? A. Yes, sir.

123 Q. Where was Mr. Upshaw at the time? A. Well, I was excited when Officer Burwell started searching me, and this and that, but when I heard the noise, in the meantime Officer Lucas walks in, then I heard something drop and Mr. Lucas says "wait a minute", so he started back and at the same time I turned where I heard the noise from, and Mr. Lucas go in the back and got Upshaw out of the way and goes back of the door, then he comes out with the bottle and he says, "That's what I thought". So he asked Upshaw, "What is this?" So Upshaw say "I don't know." So Officer Lucas laughed at him, says, "Aha, you don't know." And that is what happened.

Q. Mr. Collis, what was your state of mind while you were being frisked, how did you feel while you were being frisked? A. Well, I didn't feel comfortable.

Q. Beg your pardon? A. I was excited like.

Q. Would you know whether the noise you say you heard was the noise of an object dropping or the noise of Mr. Upshaw's heels, the noise of an automobile on the street, or what? A. Well, I would say it was an object dropping, to my mind. I mean, to my mind, I would say it was something dropped.

Q. But you just finished saying that your mind was a little bit

124 confused under the circumstances? A. Well, yes, it was, but at the same time I could hear, you know.

Q. And you are sure you are not confused now? A. Yes, I am not confused.

Q. Now, let me ask you, Mr. Collis, you are a co-defendant in this case, you have never, this isn't the first time I hear this story?

MR. WEEDA: I don't know what counsel is getting at.

THE COURT: Neither does the Court. Objection sustained, if there is one.

Q. Did Mr. Upshaw show you an electrical object at the time, a small piece of electrical hardware?

MR. WEEDA: Before he answers that, may we establish what time?

THE COURT: Well, it was while they were in the vestibule, the Court would imagine.

MR. WEEDA: I assume that it was. I want to make it clear.

THE COURT: All right, go ahead, did he show you any electrical appliance in his possession?

THE WITNESS: Not that I remember.

THE COURT: All right.

MR. DE CHIMAY: No further questions.

125 Questions By Mr. McLaughlin:

Q. Did you ever tell the story you are telling now to the police? A. Yes, I have. I did except -- I told everything I just got through saying to the police except I went as far as I heard something drop. I did not say that I knew who had the bottle, that I have seen the bottle in Upshaw, but I went to the point that when Mr. Lucas came in and Mr. Burwell was searching me, then Lucas came in, when I heard something drop, I says I heard something drop.

Q. You just heard something drop, is that right? A. Yes, sir. They asked me, he says, "Did you hear something drop..."

Q. Well, you answered it. You just told the police that you heard some object drop, is that right? A. Yes.

Q. Now, my friend asked you if when the police searched you you were all excited and you said you were? A. Well, I was excited.

Q. What were you excited about, you didn't have anything on you that wasn't legal, did you? A. Well, the reason of the fact that I was excited was because of being on probation. I was on probation. As a matter of fact, I am still on probation.

Q. In other words, you are the same Peter T. Collis that was convicted in 1953 of the violation of the Harrison Narcotic Act?

126 MR. WEEDA: I don't believe it was a violation of the Harrison Act.

THE COURT: Well, he was convicted of the use and sale of narcotics.

MR. McLAUGHLIN: He was convicted and sentenced to three years on probation.

Q. Where were you convicted of that, in the District Court or in the Police Court? A. I couldn't tell you, sir.

Q. What was your sentence, maybe we can judge it by that? A. Well, I got a year and they suspended the time and placed me on three years' probation.

Q. Well, you were charged with possession of narcotics, is that right? A. Well, that is user of narcotics, yes, sir.

Q. Heroin, is that right? A. Yes, sir.

Q. Now, did you get paid Saturday, that is, the 31st of December? A. Would you mind saying that again?

Q. Did you get paid where you worked? A. Paid?

Q. Yes, on December 30th or December 31st, from your brother? A. We usually get paid on Fridays.

Q. Well, did you get paid that Friday? A. Yes.

127 Q. All right. How much money did you get? A. I couldn't tell you exactly how much.

Q. All right. And you did this odd job Saturday, is that right, the 31st? A. I believe that was the day.

Q. All right, and how much did you get for that? A. $13.50.

Q. Now, when you went down to Southwest on January 2nd, how much money did you have with you? A. Whatever change I have, like I stated before.

Q. How much money did you have with you. A. Some change, like one fifty, one seventy-five.

Q. All right. What did you do with your salary and this money that you obtained Saturday? A. Well, I have bills to pay like everybody else. I give my sister money like I usually do. I paid a few bills. My laundry, this and that, and I had some money home. Like I stated before, I left my wallet in my other pants.

Q. All right. Do you recall how much you had left in your wallet? A. It's been now close to five months. I couldn't give you an exact figure, but I say about seventeen or eighteen.

Q. All right. Did you have any reason for leaving it home in your wallet when you went down in the Southwest? A. Well, I forgot it.

128 Q. Oh, you just forgot it? A. Just forgot it.

Q. Now, when you went down to the Southwest, you didn't go to the Southwest looking to buy heroin? A. I did not.

Q. Weren't you in the habit then? A. No, I was not.

Q. How long had you been off the habit? A. It has been quite a while.

Q. How long prior to January 2nd? A. Well, I came out on August, '55, from the hospital. Well, truthfully speaking, everything so far I have said is true, and I will say this, that since I have been out of the hospital I have had contact with drugs, nothing to become an addict again. I could say that I did not have but if I did I wouldn't be telling the truth.

Q. All right. When you went into the hospital how many caps did you use a day? A. When I went in the hospital I believe I used about a cap a day.

Q. One cap a day, is that all? A. Yes.

Q. All right, and when you came out you say --- A. I went voluntarily to the hospital. I asked for it.

Q. And when you came out how many caps did you use a day? A. Like I say, I have used it maybe two or three times.

129 Q. Well, how many capsules did you use? How many of these (indicating) did you use a day? A. Well, since I have been out, all together I will say I have had about four or five capsules in the past ten months or so.

Q. Since you have been out, how do you take them, by injection with a needle? A. No. I used to.

Q. Well, now, these last four or five times you have taken them since you have been out of the hospital, did you take them with a needle? A. No. In my nose.

Q. Sniff it? A. Yes.

Q. When did you acquire that habit, after coming out of the hospital? A. Yes. After I came out of the hospital I had, like I say, some contact with drugs, nothing too much.

Q.. When you say "contact with drugs", where would you buy this, in Southwest Washington?

MR. WEEDA: I object to that question, Your Honor.

THE COURT: Yes, that is going pretty far afield. Unless you can confine it to this other defendant.

Q. All right. On January 2nd, you were down at the Southwest
130 about 4:30 in the afternoon, is that right? A. Yes, 4:00 or 4:30.

Q. And you were down there to see your father? A. Well, yes.

Q. Where did your father live at that time? A. He lives at 629 4th Street, Southwest, and his place of business is 620 4th Street, Southwest.

Q. And you went down there for the purpose of seeing your father, is that right? A. Yes. I just go there.

Q. You went across the street and your father's store was closed? A. Yes.

Q. After you found the store closed did you go to his house?
A. No, I did not.

Q. All right. Then you crossed back again, isn't that right?
A. I did not go across at fourth.

Q. Didn't you go across the street to see the lights? A. I stopped

on this side of the street.

Q. Oh, you were on this side? A. Yes.

Q. Then you continued down this side to I Street until this man called you over? A. Yes.

Q. Well, now, do you know why Lucas called you over? A. Not Lucas.

131 Q. Or Upshaw, rather? A. No. I could not say.

Q. Did Upshaw know you were in the habit? A. I don't know if he did or not.

Q. How long had you known Upshaw prior to January 2nd? A. I wouldn't say I knew Upshaw. I have seen Upshaw. As a matter of fact, I didn't know his real name, I mean, his name "Upshaw" 'til we got arrested.

Q. In other words, you would know him because you would see him around Fourth Street, Southwest? A. Yes. I know a lot of people by seeing them. I have been seeing them for five or ten years.

Q. But I mean, would you see him down there quite often? A. Not too often, but often enough.

Q. He never helped you enough, only on this one occasion, as far as electrical work was concerned, is that right? A. No, he did not, and the reason, I believe, he helped me that day was because of being he was right there and he said, "Let me give you a hand."

Q. So there was no close association and/or friendship between you and Upshaw, is that right? A. No, sir.

Q. Now, when you crossed the street here (indicating), Upshaw was standing on the corner, wasn't he? A. When I passed the car of Officers Burwell and Lucas, as I come by I say, you know, I say hello to them, you know, and then I turned around, you know, to walk

132 towards South, then I did not see Upshaw anymore at the corner.

Q. Well, he was standing out at the corner when you first saw him? A. When I started crossing, yes.

Q. He yelled at you, is that right? A. Yes.

Q. Then, after you said hello to the police officers you started down the street, and then when you passed 902 Upshaw yelled at you? A. Yes. Somebody yelled and I turned around.

Q. Then you turned around and walked back? A. Yes.

Q. You said something about 902, there is a door there but it is not always closed, you remember when you said that? A. Well, yes, it is a door. It is two doors. It is a door but no door on it -- I don't know.

Q. In other words, they used it like a storm door, the first one? A. I don't know what it is.

Q. Anyway, he called you. Why did you go back to him for? A. Well, the man is calling me. I figured he wants something. I didn't know what he wanted. I say maybe he lives there, maybe he wants to show me something. I don't know.

Q. On direct examination you said you thought he might want to
133 sell you something? A. I did not say such a thing.

Q. I will ask you again, why did you go back? A. Like I say, I thought the man wants to show me something.

Q. To sell you something? A. To show me something.

Q. Show you something? A. Yes.

Q. What did you have in mind that he was going to show you? A. I couldn't tell exactly. Maybe he lived there. Maybe he saw I am an electrician. Maybe he wanted to show me something, a light or something.

Q. Now, you were familiar with -- familiar enough with that neighborhood and familiar enough with Upshaw to know that he didn't live in that place, weren't you? A. I was not familiar with Upshaw.

Q. What? A. I did not know where Upshaw was living.

Q. Now, when you crossed the street, didn't you immediately go right into 902 without any hesitation at all? A. I did not. I first crossed the street, there is a theater there, that is where the officers were parked, and I went by them, and like I said, I had to rush a little bit and get out of the way, when I waved at them, you know, "How do you do?", when I turned around again I looked towards where Upshaw

called me first when I was on the west side of the street but he wasn't
134 in sight, so I continued walking where I started to go, to that place, that restaurant.

Q. All right, let's get back to this place, and then I am through. Then you say when you went in Upshaw closed the door behind you, isn't that right? A. No. He didn't close it. I didn't say that.

Q. Well, you went in, didn't you? A. I went in the front door.

Q. Well, that's it. A. It is a vestibule. It is a door. It was a door but no door, you know what I mean, no wooden door but there is a place for the door.

Q. Well, let's take this outside door. We will take them one at a time. When you were inside with Upshaw didn't he close the outside door, that is, the door abutting on the sidewalk? A. I don't know. I don't think he did.

Q. All right. Let me put the question to you --- A. I won't say yes or no.

Q. Wait a minute, one at a time. When the police came there didn't they have to push the door open to get in? A. Yes.

THE COURT: Pardon me. Will counsel be sometime longer?

MR. McLAUGHLIN: Yes. I think we better recess.

135 THE COURT: The Court recesses until two o'clock.

Whereupon a recess was taken from 12:45 o'clock P. M. until 2:00 o'clock P. M. the same day, May 9, 1956, at which time proceedings were resumed as follows:

(The defendant Collis resumed the witness stand)

ON CROSS-EXAMINATION RESUMED:

Questions by Mr. McLaughlin:

Q. You didn't see your father on January 2nd? A. No, I did not.

Q. And that was the reason for going down to the Southwest, is that right? A. Yes.

Q. Now, while you were in the hallway there, did you handle that bottle? (Indicating) A. I did not, sir.

Q. Were you able to see what was in the bottle? A. Well, when I saw it in the palm of Upshaw I could tell it was something in the bottle, yes.

Q. Now, when you say you could tell there was something in the bottle, you knew what was in the bottle, didn't you? A. I had a pretty good idea.

Q. Well, didn't you know what was in the bottle? A. Well, I knew it was something looked like a drug.

Q. Now, when you say "looks like a drug", I will ask you to look at this bottle (indicating), look at those capsules, you know what they
136 are, don't you? A. I have seen something like these capsules.

Q. What do you mean by that? A. I have seen, you know, drugs like these. It is the same capsules they use, they put drugs in them, but I don't know what the capsules got in them.

Q. Now, from your past experience, every time you purchased drugs they were in capsules like that, weren't they? A. Yes.

Q. So when this man showed you these capsules you knew they were heroin? A. The way he approached me, I figured they must be drugs.

Q. Must be drugs? A. Yes.

Q. You know why he should attempt to sell you drugs? A. Well, from my past, maybe somebody told him, you know, that I have used drugs, maybe he can sell me something. I don't know why.

Q. All right, and Saturday, when you were fixing this light in the store, did he attempt to sell you any drugs then? A. No, he did not.

Q. Did you have any conversation with him at that time about drugs? A. No, I did not.

Q. Nothing at all? A. Nothing at all.

137 Q. So far as you knew, there was nothing you said or nothing you did on Saturday that would indicate to him that you wanted drugs?

A. No, sir.

Q. What? A. No, sir.

Q. Now, did this happen in the hallway, did this defendant Upshaw pass you these capsules and then when you saw the police come in didn't you get rid of them? A. No, sir.

Q. What? A. No, sir, I did not.

Q. Now, you said Upshaw said something to you to the effect that it was a cold day, is that right? A. Yes.

Q. And that he wanted to go home? A. Yes.

Q. And did he say these were all that he had left to sell? A. Well, he told me that "I got a few things", that is the very words. He didn't tell me drugs or anything. He says, "I am trying to get rid of them so I can go home, you interested"? That is exactly what he told me.

Q. Now, when you say he said that he said that he had a few things, that is the language they use selling drugs, referring to capsules, isn't it? A. I wouldn't say that. Probably, the way he is speaking.

138 Q. I mean, you heard capsules referred to before as "things", have you not? A. Not to my knowledge.

Q. Never had? A. I have heard as capsules, yes, not as things.

Q. Never heard that before? A. I have heard them called a capsule, yes, but I haven't heard anybody call them "things".

Q. Let me ask you this, when you went in the vestibule and this man closed the door after you, didn't you become suspicious? A. He didn't close the door. Well, the door closed itself.

Q. Well, he was inside the door, the door opened inwards? A. He opened the door and got inside, you see, and I stood in front of the door. Now, the door was some ways open and I was, you know, in front of the door, with my right foot stepping where the door was, and, you know, made us face as he opened it, so that is where I talked to him, so I could talk to him, I didn't go behind the door.

Q. And isn't it a fact that when you crossed "H" Street, that is, from the west side to the east side, your purpose was to contact Upshaw to get drugs? A. No, sir. My purpose was, he called me to go over and see what he wanted, that was my purpose.

Q. Then when you got over there he wasn't there, is that right?

139 A. He was not there, no.

Q. And then the next time you saw him was when he yelled at you to come into the hallway? A. Yes, until somebody shouted at me and I turned and there was Upshaw by the doorway.

Q. Now, why didn't you, when you were arrested, questioned by the police, you were questioned right in front of 902, weren't you? A. Well, some questions they asked me.

Q. Some questions? A. Yes.

Q. And then you were brought to No. 4 Precinct? A. Yes, sir.

Q. And you were questioned down there? A. Yes, sir.

Q. And the police asked you whether or not you saw this bottle, did they not?

MR. WEEDA: I object to the question. He is asking why didn't the police ask him.

MR. McLAUGHLIN: No. I said, didn't they.

THE COURT: The Court understood him to say "didn't they".

MR. McLAUGHLIN: I am asking him. He ought to know.

THE COURT: This is cross-examination. Objection overruled.

140 Q. Didn't the police ask you about this bottle? A. Yes.

Q. And in asking you about the bottle they showed you the bottle, didn't they? A. Yes, some bottle like that one, yes.

Q. Now, did you tell them that you saw this bottle in Upshaw's hand? A. No, I did not tell them.

Q. Did you have any reason? A. Yes.

Q. Why? A. One reason, as I said before, I was on probation, and I did know that I might say something to get myself involved in a crime that I did not commit it, so I thought I would wait to get some instructions, see my lawyer, somebody to tell me, you know, what to do.

Q. But you did tell them that you heard something drop? A. Yes.

Q. And, of course, that thing that dropped would have to drop from Upshaw, wouldn't it? A. Well, it dropped from where Upshaw was at.

Q. Only you and Upshaw were in there, isn't that a fact, before the police got there? A. When the bottle dropped I was away from Upshaw. I was under the custody of Officer Burwell. I was already searched.

141 Q. Well, now, the police went right in this vestibule, didn't they? A. Mr. Lucas went back there where he found the bottle.

Q. Didn't Officer Burwell have to push the door in to get in the place? A. Well, he had to come in the front, the first door. When he came in I was going out away from Upshaw. You might not believe this, this is the truth. I am going out, Officer Burwell walks in, and he stopped me.

Q. Well, let us, so we will understand one another, you only went in through one door, is that right? A. Yes.

Q. You didn't go through the second door? A. No, sir.

Q. So that when you went in this first door that put you right in this vestibule where Upshaw was? A. Yes.

MR. McLAUGHLIN: That is all. I have nothing further.

ON REDIRECT EXAMINATION:

Questions by Mr. Weeda:

Q. Mr. Collis, you testified that Mr. Upshaw said, "I have some things, it is cold and I want to go home; are you interested?" What was your reply to him? A. I told Upshaw, I says, "No, thanks, I am not interested, I am off that stuff."

142 Q. Mr. Collis, did that bottle get in your possession? A. It did not.

Q. Did any of those capsules get in your possession? A. No, sir.

Q. Did you see that bottle leave Mr. Upshaw's hands? A. I did not.

Q. You testified that you had used dope, and you had used four or five capsules, I think, after you came out of the hospital? A. Yes.

Q. Do you recall when you had last used any dope prior to January 2nd of 1956, the date that this incident occurred? A. It was around November, I imagine.

Q. Of '55? A. Of '55, yes.

Q. Now, between November of '55 and January 2nd of 1956, you say you hadn't used any dope? A. I had not.

Q. Did you say why? A. Well, I had many reasons. The main thing was I wanted to go straight and make something out of myself. I felt that I didn't get any good out of drugs. Of course, myself and my family have hard feelings, and, you know, many reasons like that.

Q. Then you testified that at that time you were completely off drugs? A. Yes.

143 Q. Now, you told the officers that you heard something drop? A. Yes, I did.

Q. How far away were you from Upshaw when you heard something drop? A. Well, I was at least four feet, four or four and a half feet.

MR. WEEDA: I think that is all.

THE COURT: You may stand aside.

(Witness excused)

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THE COURT: Anything further from the defendant Collis?

MR. WEEDA: Nothing further. May I approach the bench, Your Honor?

THE COURT: Yes.

(Before Bench:)

MR. WEEDA: Your Honor, if it is appropriate, at this time I wanted to renew my motion for a judgment of acquittal for the defendant Collis, for this reason: I don't believe it has been shown at any time that he had possession of this bottle. The officers testified that when they opened the door they saw no movement on his part. In fact,

144 they testified that he said he heard a bottle drop. There is no evidence that the Government has brought in that actually shows any physical custody, or any control, or any supervision over that bottle by the defendant Collis. I can't see that there is sufficient evidence to take it to the jury as far as the defendant Collis is concerned, from the testimony of the officers.

THE COURT: The Court thinks there is sufficient testimony to warrant a charge to the jury that they were both principals and, therefore, if they believe the evidence, of course, they can find him guilty. Motion is overruled.

(End of Bench Conference).

THE COURT: All right, does the defendant Collis rest?

MR. WEEDA: Yes.

THE COURT: All right, what does the defendant Upshaw say?

MR. DE CHIMAY: We will call the witness Hatcher.

MR. WEEDA: Your Honor, may I approach the Bench again?

THE COURT: Yes.

(Before Bench:)

MR. WEEDA: I have another witness that I would like to put on,

145 I am sorry. It is an auditor for this firm who will testify that Mr. Collis has been working for the Collis Electric Company during the past months before the date in question. I think it is important for this reason: It would show that if he was working daily that perhaps it would indicate to the jury that he may not have been using drugs. May I please re-open the case?

THE COURT: All right. The Court will let you do that.

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149 (Witness excused)

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MR. WEEDA: The defendant Collis rests.

THE COURT: All right, call the witness for the defendant Upshaw.

MR. DE CHIMAY: The witness Hatcher.

150 Whereupon,

LOUISE HATCHER,

a witness called by counsel for the defendant Upshaw, having first been duly sworn, in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. De Chimay:

Q. Will you please state your name? A. Louise Hatcher.

Q. Miss Hatcher, what type of work do you do? A. I am a waitress.

Q. I can't hear you. A. I am a waitress.

Q. Where do you work as a waitress? A. 1014 - 4th Street, Southwest.

Q. Were you working there on the 31st of December? A. I was.

Q. Did you see the defendant Collis and the defendant Upshaw there? A. Yes, sir.

Q. What were they doing? A. Well, Mr. Collis was doing some electricity work.

Q. Was Mr. Upshaw doing anything? A. No. He was handing him some tools. They got acquainted and he was handing him some tools.

151 Q. How long was Mr. Upshaw handing Mr. Collis tools? A. That I wouldn't know because I was working at the time.

Q. Well, did you see them at one time and then seen them later on or between the times you were working? A. That I wouldn't know either because we was awful busy.

MR. DE CHIMAY: No further questions.

ON CROSS-EXAMINATION:

Questions by Mr. McLaughlin:

Q. You see Upshaw down there quite often, don't you? A. Yes, sir.

Q. In other words, he is around that neighborhood every day of the week, isn't he? A. That is right, sir.

MR. McLAUGHLIN: That is all.

Questions by Mr. Weeda:

Q. What is the name of your employer? A. Mr. Jerry.

Q. Jerry what? A. Basilikos.

MR. WEEDA: That is all.

THE COURT: You may stand aside.

(Witness excused)

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152 MR. DE CHIMAY: Call the defendant Upshaw.

Whereupon,

WILLIAM UPSHAW,

one of the defendants, was sworn as a witness in his own behalf, and in answer to questions propounded, testified as follows:

ON DIRECT EXAMINATION:

Questions by Mr. De Chimay:

Q. Please state your name? A. William Upshaw.

Q. You are the defendant in this case? A. Yes, sir.

Q. How old are you? A. Forty-two.

Q. What is your occupation? A. Electrical helper and truck driver.

Q. Have you ever been convicted of any crime? A. Yes, sir.

Q. What crime? A. In 1932 I was convicted of unauthorized use of an auto.

Q. Have you ever been convicted of any other crimes? A. Yes, about twelve times.

THE COURT: What was that answer?

THE WITNESS: About twelve times.

153 Q. Did you commit the crimes for which you were convicted?

A. Yes, sir.

Q. Have you ever been convicted of any crime involving narcotics?

A. No, sir.

Q. Where were you on January 2, 1956, about 3:45 in the afternoon?

A. At the corner of 4th and "I" Streets, Southwest.

Q. I am sorry, I couldn't hear. A. At the corner of 4th and "I" Streets, Southwest, bus stop.

Q. What were you doing? A. Waiting for a bus.

Q. Did you see Collis? A. Yes, sir.

Q. Did you call him over? A. I don't know whether I called him over or he come over himself.

Q. When he came over did you discuss anything with him? A. Yes, sir, I did.

Q. What? A. I had a little small insulation that come off of a

fluorescent light that I had found in my pocket after I had helped him that Saturday. I was talking with him about that insulation.

Q. Did you offer to sell him any narcotics? A. No, sir.

154 Q. Did you at any time own that vial which is Government's Exhibit No. 1? A. No, sir.

Q. Did you ever see it before Officer Lucas or Officer Burwell showed it to you? A. No, sir, I hadn't.

Q. Did you know it was in that vestibule? A. No, sir, I didn't.

Q. What type of shoes were you wearing on that day? A. Same shoes I have on now.

Q. Were those shoes repaired or modified in any manner since then? A. Not since then.

Q. Will you please stand up and will you knock your heel once against the floor?

(Witness complies with counsel's request)

Q. Louder, please.

(Witness again complies with counsel's request)

Q. Thank you.

MR. DE CHIMAY: No further questions.

ON CROSS-EXAMINATION:

Questions by Mr. McLaughlin:

Q. Are you the same William Upshaw who was convicted in '32 of unauthorized use of an automobile? A. Yes, sir.

155 Q. And are you the same William Upshaw who was convicted of attempted larceny in 1933? A. Yes, sir.

Q. Are you the same William Upshaw who was convicted of grand larceny in 1938? A. That is right.

Q. Are you the same William Upshaw who was convicted in 1946 of two charges of petty larceny? A. Yes, sir.

Q. And again in 1946 you were convicted of petty larceny?

A. No, that is the same charge.

Q. On November 12, 1946, were you convicted again of petty larceny? A. Yes, sir.

Q. Are you the same William Upshaw who in 1948 was convicted of two charges of petty larceny? A. Yes, sir.

Q. And, again, are you the same William Upshaw who in 1949 was convicted of petty larceny? A. That is right.

Q. And, again, are you the same William Upshaw who in 1955 was convicted of petty larceny? A. Yes, sir.

Q. In 1938 you were convicted of housebreaking and grand larceny in Richmond, Virginia, is that right? A. That is right.

156 Q. Now, during the week of December 31st of 1955, where were you working? A. Worked for my landlord.

Q. You were working for your landlord? A. Yes, sir.

Q. Who was your landlord? A. At that time it was Cleo Woods.

Q. Cleo Woods? A. Yes, sir.

Q. All right, and where did he live? A. He lived at 338 "K" Street, but he lives at 336 "K' Street, Southwest, now.

Q. Where did he live at that time? A. 338 "K".

Q. And what kind of work did he do? A. He gets together wrecked cars and then cuts them up and he sells them.

Q. Where was his place of business? A. Don't have no place of business, right on the lot next to where he lives at.

Q. Where would he cut these cars up? A. Cut the cars up where he buy them at.

Q. And throw them on the truck? A. Yes, sir.

Q. And bring them up to this lot? A. Yes, sir.

157 Q. Does the lot have a fence around it so people won't get in? A. No. He carries them right to the junk yard before he put the truck on the lot.

Q. I see, he gets rid of them every day? A. Yes, sir.

Q. Buy it that day and sell it that evening down at the junk yard? A. That is right.

Q. How long had you worked for him? A. Since October.

Q. And you were working for him during the week of December 31st, of 1955? A. Yes, sir.

Q. Well, now, what salary did you get? A. We shared.

Q. What? A. We shared. We didn't get no salary.

Q. You shared what? A. We shared what we made. Maybe we make ten dollars one day and then maybe none the next day, and so on.

Q. Did you have a horse or did you have an automobile? A. A truck.

Q. And who owned the truck? A. He owned the truck.

Q. And where did he keep the truck? A. He kept the truck on the lot.

158 Q. How did you cut in on the truck? A. Well, that was separate. That was taken out separate.

MR. DE CHIMAY: I object to this as being outside the scope of cross-examination.

THE COURT: The Court thinks that goes to his credibility on cross-examination. Objection overruled.

Q. You say that was taken out of the profits of the day? A. Yes, sir.

Q. Well, now, did you keep any record of it? A. No, sir.

Q. Well, how much would you make a day? A. I told you just a while ago, sometimes we didn't make none, sometimes maybe five, sometimes maybe we make ten.

Q. Well, would you say ten was a big day? A. Right nice day.

Q. Ten was a right nice day? A. Yes, sir.

Q. Where were you living? A. I was living at 338 "K" Street.

Q. Northwest? A. Southwest.

Q. Southwest? A. Yes, sir.

Q. And on Friday -- I think Friday would be December 30th,

159 would it not? A. Yes, sir.

Q. Did you work that day? A. Yes, sir.

Q. How much did you make that day? A. I don't know for sure how much I made that day. I couldn't say.

Q. Was it a big day or small day? A. I couldn't say that.

Q. Was it a big day, you said, when you made ten dollars? A. If it had been a big day but I don't know whether it was or not.

Q. If it was a slow day it would be what? A. It may have been two dollars.

Q. That wouldn't pay for gas, would it? A. No, sir.

Q. All right. What did you make the day before that, do you recall? A. I couldn't recall it.

Q. Well, can you tell us whether it was a big day? A. I didn't keep no record of the time I made.

Q. Well, the week of December 31st is not so long ago, can you tell us that entire week whether it was a big week or whether it was a slow week? A. I couldn't tell you. On the average, some days it was good, some was bad.

160 Q. Well, we will say the five days of that week prior to December 31st? A. I am not making any definite statement on that because I don't know.

Q. What's that? A. I am not making any definite statement because I don't know.

Q. What do you mean by that? A. I don't know if it was a good day or bad day.

Q. Let me ask you this, you remember Christmas was the 25th of December? A. Yes, sir.

Q. Did you have a lot of money on Christmas time? A. No, sir.

Q. So if you didn't have a lot of money you had a slow week before Christmas, is that right? A. That is right.

Q. Now, from Christmas on, from the 25th to the 31st, did you make a lot of money during that time? A. I imagine I made about twenty-five or thirty dollars.

Q. About twenty-five or thirty dollars? A. Yes, sir.

Q. Out of that twenty-five or thirty dollars you had to eat, didn't you? A. Yes, sir.

Q. And you had to pay -- what do you have, a room? A. A room.

161 Q. How much did you pay for the room? A. Didn't pay anything.

Q. Oh, it's free? A. Yes.

Q. Where do you eat? A. Eat right there.

Q. That is free too? A. No, sir.

Q. You pay for that? A. Yes.

Q. Now, when you were arrested you had sixty-five dollars on you? A. That is right.

Q. Where did you get that sixty-five dollars? A. I hit the numbers that Saturday.

Q. Oh, you hit the numbers? A. Yes, sir. I had 679 to be exact.

Q. What was the number? A. 679.

Q. And what did you have, a combination or what? A. I don't know. I hit 679.

Q. How did you play it? A. 679,

Q. But I mean, what did you play, a combination? A. I played 679 straight.

162 Q. Not a cut number? A. No, sir.

Q. You know what a cut number is? A. Yes, sir.

Q. Who did you play it with? A. "Kingfish".

Q. Rather definite in all your answers. Well, all right. When you worked Saturday with Collis did he give you any money for helping him? A. No, sir.

Q. Did you ever work with him before? A. No, sir.

Q. Did you ever see him before? A. Yes, sir.

Q. How often had you seen him prior to Saturday, December 31st? A. I seen him a few times on Fourth Street. I won't say what date it was.

Q. Did you have an occasion to talk to him when you saw him on Third Street? A. Yes, sir.

Q. Fourth Street, rather? A. Yes, sir.

Q. Would you go so far as to say that you and he were friendly, or friends? A. No, I wouldn't say that.

163 Q. When you talked to him on these other occasions, just what did your conversation amount to? A. Both of us know a girl. Could

have been about that.

Q. Both of you know the same girl? A. Yes.

Q. What does that girl do? A. I couldn't tell you.

Q. She has nothing to do with narcotics, has she? A. No, sir.

Q. Well, now, when you would meet him would you and he discuss, that is, talk about this girl, would that be the subject?

MR. WEEDA: I would object to this line of questioning, anything about this girl.

THE COURT: Objection sustained.

MR. McLAUGHLIN: He injected the girl in.

THE COURT: Objection sustained as to what the girl did or what was said about the girl.

A. I told you why we had been together.

Q. That is why you had been together, all right, then, during that time you never discussed narcotics? A. No, sir.

Q. What? A. No, sir.

Q. Now, on Saturday, when you helped him, did you ask him for any money? A. No, sir.

164 Q. You just done it free? A. I didn't do that much work to ask him for any money.

Q. How did you happen to get in this restaurant? A. To get something to eat.

Q. You eat there lots of times? A. Yes, it's near there.

Q. Right near you? A. That is right.

Q. Now, on this particular day of December 2nd of 1956, or, January 2nd, where did you live? A. I lived at 338 "K" Street.

Q. 338 "K" Street. You didn't live at 902 4th Street? A. No, sir.

Q. How did you come to be in that vestibule when the law came? A. I was waiting for the bus, and the wind was blowing. I was standing between the two bay windows to keep the trash from blowing in my face.

Q. This was a holiday, wasn't it, January 2nd? A. That is right.

Q. And it was about 4:30 in the afternoon? A. That is right.

Q. Where were you going to take the bus to? A. I was going to 202 "E" Street, Northwest.

Q. Up to 202 "E" Street? A. That is right.

165 Q. And you had about sixty-five dollars in your pocket? A. That is right.

Q. How much is a taxi? A. I don't ride taxis.

Q. So you were waiting for a street car, or, a bus, rather? A. That is right.

Q. Did you have an overcoat on? A. Yes, I had an overcoat.

Q. And while you were waiting for the bus, is that when you first saw Pete Collis? A. I didn't see him 'til he come right along by me.

Q. Didn't you call him across the street? A. No, sir.

Q. You deny that? A. Yes, sir, absolutely.

Q. Now, you say that you were standing there when he walked in right by you? A. Standing when he walked right up to me.

Q. All right, when he walked up to you, where were you standing? A. I was standing between the bay window of the whiskey store and the bay window of the old pool room, that is right in front of 902.

Q. Now, when you say this liquor store, where is the door to the liquor store where you go in? A. The door to the liquor store is to the

166 left where I was standing.

Q. Now, there are show windows on each side? A. Yes, sir.

Q. In other words, when you walk in the liquor store you have to walk in between the two show windows? A. Between two bay windows.

Q. If it was windy why didn't you stand in the doorway of the liquor store? A. I would have been obstructing the customers going in and out.

Q. Was the liquor store open? A. Yes, sir.

Q. You are sure about that? A. Yes, sir.

Q. And then Pete came along, and what did you talk about? A. I told him, I talked about the insulation that had come off of the fluorescent light, the little piece I had in my pocket.

Q. Did you hand it to him? A. I don't know whether I handed it to him or the police taken it, they come in so quick.

Q. Well, when you met him you met him on the sidewalk? A. Right on the edge of the door.

Q. How did you and he get in the vestibule? A. I backed up in the door, right at the edge of the door.

167 Q. Now, when you backed up, with your back you opened the door, is that it? A. The door was already open.

Q. You mean wide open, ajar, like that? (Indicating) A. Yes, sir. The vestibule door was wide open.

Q. So you and Pete went in there? A. Yes, sir.

Q. And how long were you in there before the police came? A. A matter of a couple of minutes.

Q. What? A. Not over a couple of minutes.

Q. Now, when the police came in there weren't you behind the door? A. No, sir.

Q. Didn't the police have to push the door to get in? A. If he did I didn't see him push it.

Q. I am asking you if you saw them? A. No, sir.

Q. Wasn't the door pushed in and when it was you were more or less behind it? A. The door was open.

Q. The door was never closed at any time? A. Not as I know of.

Q. Well, what do you mean by closed? A. It may have been two or three inches from the wall.

Q. So that you mean that the door would be partly open or partly

168 closed? A. That is right.

Q. Now, could you and Pete get in there without moving that door? A. There is a space about as wide as this here (indicating), and there is just about six inches from the wall. There is plenty of room for two people to get in there, one standing in front of the other.

Q. Oh, one standing in front of the other? A. Yes.

Q. By the way, on that day, January 2nd, were you an addict? A. No, sir.

Q. You never used it? A. Yes.

MR. DE CHIMAY: We object to that, Your Honor. I didn't bring that out.

THE COURT: This is a charge about narcotics. Objection overruled.

Q. You say you weren't using it then? A. No, sir.

Q. On January 2nd? A. No, sir.

Q. Well, now, when you and Peter Collis were in that vestibule did you have any talk at all about narcotics? A. No, sir.

Q. What? A. No, sir.

169 Q. Well, now, how long would you say you were in there before the police came? A. Just about two or three minutes.

Q. And you say that when you and Collis were in there you were pretty well crowded in that vestibule, weren't you? A. That is right.

Q. There wasn't much room to move around? A. No, no room to move around.

Q. Do you remember stepping on a bottle? A. No, sir.

Q. Do you remember Pete stepping on a bottle? A. No, sir.

Q. Do you remember stepping on anything that you had to look down to see if you stepped on it? A. No.

Q. Now, if the police walked in there when they said they did, and you and Collis were in there, and this bottle was on the floor, you would have stepped on it, or Collis would? A. They said they found it behind the door. Did nobody go behind the door.

Q. Well, where was the door, how did they find it behind the door? A. I don't know. The policeman made the statement, I had never seen it before.

Q. Didn't they -- when they opened the door how far was the door
170 from the wall? A. I couldn't tell you.

Q. Well, when the door was opened and the police came in, were you right near that part of the door? A. I was right where he could see me.

Q. You were right up here at the end of the door? (Indicating)
A. I was back by the second door, by the end of the first door when it opened.

Q. Are you the one that tossed that bottle on the floor? A. No, sir. I hadn't seen the bottle before Officer Lucas brought it out.

Q. And while you were in there you didn't hear any object fall to the floor? A. No, sir, I didn't.

Q. You didn't hear a sound? A. No, sir.

Q. And you didn't step on anything? A. No, sir.

Q. Did you at that time, while you were in there, attempt to sell these capsules to Collis? A. No, sir, I didn't.

Q. What? A. No, sir, I didn't.

Q. Was that sixty-nine dollars part of the money that Collis gave you for these capsules? A. No, sir, it wasn't.

171 Q. Isn't it a fact that on January 2, 1956, that you were stationed down around that immediate section for the purpose of selling narcotics? A. No, sir, it isn't.

Q. And isn't it a fact that these are all you had left at the time Collis came? A. No, sir, don't know anything about the drugs.

Q. What? A. I don't know anything about them.

Q. You don't know anything about what? A. Whatever it is in that bottle.

Q. Now, when you say "whatever it is in that bottle", you know? A. Well, I will say "drugs" then. I have never seen them.

Q. You know what kind of drugs they are, too, don't you? A. Yes, sir.

Q. What are they? A. They are supposed to be heroin.

Q. And you deny that you ever had these drugs in your possession? A. I do.

Q. And that you ever saw them before? A. I saw them when Officer Lucas had them.

Q. That is what I say, that is the only time? A. That is right.

172 Q. You never saw them when you and Pete Collis were in that vestibule? A. No, sir.

MR. McLAUGHLIN: That is all.

Questions by Mr. Weeda:

Q. Mr. Upshaw, at any time did you see whether or not the defendant Collis ever had this bottle in his possession? A. No, sir. I didn't see the bottle in his possession.

Q. Mr. Upshaw, at the time that the police arrived on the scene which police officer did you see first? A. Officer Burwell.

Q. And where was Officer Lucas? A. Right behind him.

Q. Which of these officers, if any, opened the door? A. Officer Burwell opened the door.

Q. When Officer Burwell opened that door weren't you behind the door? A. No, sir.

Q. Where was Mr. Collis? A. Standing right opposite me.

Q. Standing where? A. Opposite me.

Q. Opposite you in the doorway? A. Yes.

Q. In other words, side by side, like this? (Indicating) A. Well,

173 you don't draw it up on that board exactly where they were, because the board is straight. He was on a cater-corner from me.

Q. Well, assuming this is the vestibule (indicating), where was Mr. Collis standing? A. Near the front door.

Q. Here? (Indicating) A. I would say right at the front door.

Q. This is the door (indicating)? A. He was near the front door.

Q. That would be here? (Indicating) A. Yes.

Q. Was he facing you? A. Yes, sir.

Q. And you were where? A. Behind him.

Q. On this side? (Indicating) A. That is right, but not behind the door, just middle-ways to the hall.

Q. You mean about here? (Indicating) A. Yes.

Q. And you say the door was just partly open? A. That is right.

Q. And Officer Burwell opened the door? A. He pushed it.

Q. He pushed the door in? A. That is right.

174 Q. When he pushed the door in did it strike you or strike Mr. Collis? A. Coul dn't strike either one of us.

Q. You were then behind the door --- A. If I was behind the door the door would have struck me.

Q. How wide is that vestibule, have you ever measured it, from this width? (Indicating) A. No. I know it is a rather small vestibule.

Q. In other words, when they opened the door, you and Mr. Collis were standing there. Were you standing together? A. No, sir.

Q. How far apart were you? A. About a foot. Half a foot, probably.

Q. What is the first thing the Officer said to you? A. "What you all doing here."

Q. And who went out the door first? You or Mr. Collis? A. Collis went out the door first. That is, we both went out together but I was behind him.

Q. And did Officer Burwell grab Mr. Collis? A. Held both of us right at the front of the door.

Q. Held both of you? A. That is right.

Q. With both hands? A. Both hands.

Q. And what did Officer Lucas do? A. Lucas went around and
175 went in the hallway and found the bottle.

Q. What did you do with that piece of insulation you say you were going to show to Mr. Collis? A. I think it was misplaced down at the jail when they took all the property out of my pocket.

Q. Where did you get that piece of insulation? A. I got if off the floor where Collis had all the tools at.

Q. And that was at 1014? A. Yes.

Q. And that was on Saturday? A. That is right.

Q. And this happened on January 2nd, did it not? A. Yes, sir.

Q. And you carried that piece of insulation for two days? A. Yes, sir.

Q. Isn't that why you called Mr. Collis, because you wanted to show him that piece of insulation? A. I didn't call him over.

Q. What made you think about the insulator? A. Because I had it in my pocket.

Q. Were you holding it for him? A. I kept it so if I did see him again to give it to him.

Q. Will you describe what that piece of insulation is? A. It is a small piece of metal that screws the three wires together, looks just like one of those toothpaste caps, one of them long toothpaste caps,
176 like a Colgate cap, it's one of them that take three wires together and screw them together for insulation.

Q. And you kept that for two days? A. That is right.

Q. Waiting to give it to Mr. Collis? A. Well, Saturday evening is when I got it. Sunday I didn't see him nowhere. There was nothing to do but keep it.

Q. How did you know you were going to see Mr. Collis? A. I didn't know it.

Q. You were going to carry that until you did see him? A. I don't know if I would carry it until I did see him or not. I probably would have gotten tired and then throw it away.

Q. Did you see Mr. Collis go by 902 4th Street, Southwest, and you called him? A. No, sir.

Q. Who entered that doorway first, you or Mr. Collis? A. Me.

Q. Mr. Collis went in after you, did he? A. That is right.

Q. Did he go completely in the door? A. Yeah.

Q. Didn't he sort of stand in between the door and the vestibule and talk with you? A. Between which door?
177 Q. The first door? A. He went inside the approach of the door. He was in the vestibule where I was at.

Q. You went in first and opened the door? A. I didn't open the door. The door was already open.

Q. It was already open? A. Yes.

Q. And when Mr. Collis got in who closed the door? A. I don't know if it was closed.

Q. You mean it always stayed open? A. Yes.

Q. How far away was the door, the edge of the door, from the side of the building? A. I would say about six inches.

Q. Well, when you walked in it was more than six inches open, wasn't it? A. He didn't shove it more than six inches open.

Q. Well, who shut the door after you went in? A. You know how wide the hallway is?

Q. I have an idea. A. Well, you know how wide the door is, and, you know, it was about six inches from the wall. There is plenty room for two people.

Q. You mean the door was completely open except for six inches? A. That is right.

178 Q. I see, and it stayed open? A. Stayed open.

Q. All the time? A. That is right.

Q. Then Officer Burwell couldn't have opened it? A. That is right.

Q. Didn't you testify that he opened the door? A. Did I testify that he opened the door? No, I didn't testify that he opened the door. I said he was the first one that come in there.

MR. WEEDA: That is all.

(Witness excused)

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MR. DE CHIMAY: We rest.

* * * * *

193 THE COURT: Ladies and gentlemen of the jury:

It is the function and duty of the Court to instruct you as to the law applicable to the case on trial, and you are bound and obligated under your oaths to follow the Court's instructions as to the law, but the members of the jury are the sole judges of the facts and you must determine the facts yourselves, according to the evidence and solely on the evidence.

The fact that the defendants have been indicted and charged with crime is not in itself to be taken as an indication of guilt and no in-

194 ference is to be drawn against them for that fact. The indictment is merely the procedure and the machinery by which a defendant

is brought before the Court and placed on trial. That is the only function of an indictment.

Now, every defendant in a criminal case is presumed to be innocent, and that presumption of innocence attaches to him and follows him throughout the trial. The burden of proof is upon the Government to prove the defendants, and both of them in this case, guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves to your satisfaction beyond a reasonable doubt that the defendants, and both of them, have committed every element of the offense charged, you must find him or them not guilty.

I said a moment ago that the burden is on the Government to prove the defendant guilty beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever. It means proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself and not just any whimsical speculation or any capricious conjecture. Proof beyond a reasonable doubt in law means simply this: If after
195 an impartial comparison and consideration of all of the evidence you can say to yourself that you are not satisfied with the defendant's guilt, then you have a reasonable doubt. On the other hand, if, after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the guilt of both of these defendants, or either of them, such as you would be willing to act upon in the more weighty and more important matters relating to your own affairs, then you have no reasonable doubt. In other words, proof beyond a reasonable doubt is proof which will result in abiding conviction of the guilt of the defendants - one or both of them, as the case may be - on your part, such a conviction that you would be willing to act upon it in the more weighty and important matters relating to your own affairs.

Now, it is not necessary to read this indictment again. These defendants are charged, both of them, with violation of law relating to narcotics. Narcotics, of course, have a recognized and legitimate use in medicine. On the other hand, their use when not under the supervision of a physician is regarded as dangerous and is susceptible of an evil influence, and for this reason the traffic in narcotics is regulated by law so that they may be available for medicinal purposes under the supervision of a physician but in order that they may not be obtainable for illicit or illegitimate uses. The illegal
196 sale, traffic and use of narcotics constitutes one of the most dangerous menaces to the security, health and youth of our country today. Accordingly, the sale and purchase of drugs are permitted only pursuant to a doctor's prescription, and a further safeguard is prescribed by law in that packages containing narcotics lawfully sold or dispensed must bear an internal revenue stamp from the United States Government, and all sales of narcotics must be made in and from the original stamped package. All traffic in narcotics, outside of the channels prescribed by law which I have just indicated, is illicit, and because of its detrimental effect on the community is regarded as criminal.

Now, in the first count of this indictment, and to be exact, the Court is going to read to you from the United States Code so there will be no mistake about the law under which this charge is brought. The United States Code, which is part of the law of our land, Section 4704 of Title 26, reads as follows, and I quote:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

Now, that is the law covering the first count of this indictment.
197 In other words, the violation consists of purchasing, selling, dispensing, or distributing a narcotic drug except in the original

stamped package or from the original stamped package. Now, the law does not require direct proof of a purchase, sale, dispensing or distribution of a drug. The statute specifically states that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." In other words, if it is proven that the defendants, or either of them, had possession of this drug, and that while in his or their possession there were no appropriate taxpaid stamps for those drugs, those facts constitute prima facie evidence of a violation of the law and the jury may find the defendants guilty on that charge if it sees fit to do so without requiring any further proof. Now, the defendants, both of them, deny that they had possession and, of course, if they did not have possession of the drug they are not guilty.

Now, under this other count in the indictment, and the Court reads again from the Code so as to be exact, and I quote from Section 174 of Title 21:

> "Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States, or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported
198 contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be punished according to law."

The Court desires, for your information and your instructions, to read one more sentence of that same section of the United States Code, and I again quote:

> "Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Court thinks it is pertinent to call to your attention one more section of the Code of the United States, and for that reason he is going to read to you from Title 18, Section 2, which reads as follows:

> "Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

Properly construed, that statute means that not only the person who directly commits the act constituting an offense against the United States is guilty of the offense, but that any person who aids, abets, counsels, commands, induces, or procures such person to commit such act is also guilty of such offense to the same degree and extent as the person who directly commits the act.

Now, as to this matter of possession, if you believe from the
199 evidence that neither of these defendants had possession of the narcotics in question, then you will acquit both defendants; and if you believe from the evidence that only one of the defendants did not have possession of the narcotics in question, then you will acquit that defendant.

In this connection, however, you will give consideration to all the facts and circumstances in evidence and, if under all the instructions I give you, you believe beyond a reasonable doubt that both of the defendants are guilty, then you will so say by your verdict, and if you find only one defendant guilty, then you will so find, stating by your verdict whether you find each defendant guilty or not guilty on both counts of the indictment.

Now, both defendants in this case have testified, and they had that right and privilege under our law. You are entitled to take into consideration, however, the fact that they are both defendants and the very strong personal interest that they have in the result of your verdict. Defendants are not to be disbelieved simply because they are defendants but you are entitled to take their interest in consideration in passing upon their testimony.

Now, the fact that the defendants both have criminal records has no bearing on the question of guilt or innocence in this particular case, except that the law admits the criminal record as to any person
200 who takes the witness stand solely for the purpose of assisting the jury in determining, if it does, his credibility as a witness and whether or not you will want to believe him under the facts and circumstances.

You, ladies and gentlemen, are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony. You will take the testimony as given from the witness stand and the law as given you by the court, and give it honest, conscientious consideration. After you have arrived at a verdict - which must be unanimous - and after you have chosen your own foreman, you will advise the Marshal and the Court will receive you. Are there any exceptions?

MR. McLAUGHLIN: None.

MR. WEEDA: No, sir.

MR. DE CHIMAY: No, sir.

THE COURT: All right, you will go with the Marshal.

(Whereupon the jury retired to deliberate and the next day, May 10, 1956, returned a verdict into Court, as follows):

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: They have, sir.

THE CLERK: What say you as to the defendant, Peter T. Collis,
201 on Count One of the Indictment?

THE FOREMAN: As to the defendant Collis in Count One, Not Guilty.

THE CLERK: Count Two?

THE FOREMAN: As to Collis on Count Two, Guilty.

THE CLERK: What say you as to the defendant, William Upshaw, on Count One?

THE FOREMAN: As to Upshaw on Count No. 1, Not Guilty.

THE CLERK: Count Two?

THE FOREMAN: As to Count Two, Guilty.

THE CLERK: Members of the jury, your foreman says that you find the defendants, Peter T. Collis and William Upshaw, not guilty on Count One and each guilty on Count Two. Is that your verdict and so say each and all?

(All jurors indicated agreement)

THE COURT: All right. You are all excused.

(All jurors then retired from the courtroom)

THE COURT: Both defendants are committed to the custody of the Marshal and both cases are referred to the Probation Officer for pre-sentence investigation and report.

* * * * *

202 Thereafter, on the 25th day of May, 1956, again before the Honorable R. E. Thomason, the following proceedings were had:

THE COURT: Now, what is the other motion in this case?

MR. WEEDA: Your Honor, this is a motion by the defendant Collis for a judgment of acquittal notwithstanding the verdict, or, in the alternative, a motion for a new trial, and the grounds for that are these:

At the trial, I feel from all of the evidence that the Government had introduced, and from all of the other evidence that was presented at the trial, that it was insufficient to support the verdict of the jury. As Your Honor recalls, there were two counts, one a violation of the

203 Harrison Anti-Narcotic Act, and the other a violation of the Jones-Miller Act. They found the defendant Collis guilty of only a violation of the Jones-Miller Act and exonerated him from the count of the Harrison Act.

Now, the Government's theory of the case, undoubtedly, Your Honor, was that there was possession because they had not proven any of the allegations, or the essential allegations of the charges. Now, the question here was whether or not the defendant Collis had possession of the narcotic drug. First of all, to ascertain what possession is, we know that it means either ownership or having

physical custody, or else, without having physical custody having some supervision or control so that you at least can exclude anyone else from possession.

Now, the evidence in this case, if Your Honor will recall, was this: That the police officers had walked up to a door and there they heard something drop, and when they opened the door they saw the defendant Collis and the defendant Upshaw standing perhaps facing one another. They saw no movement of any kind. The bottle was found subsequently in the corner where the defendant Upshaw was standing, and they found nothing at all after a search on the defendant Collis. Now, under those circumstances, it is a question of whether or not the jury could find that there was possession. There was no
204 physical custody by Collis. There was no evidence that he had ownership. In fact, Your Honor, this drug was found in the vestibule of a private home, undoubtedly, and Collis did not live at that residence. Therefore, they showed no physical contact of that drug with Collis, nor did they show that he could in any way supervise any control or custody over it. In other words, all that the officers testified was that they walked into a vestibule and picked up a bottle of narcotics which they had never seen before or had never seen in anyone's custody or control. Therefore, we feel, Your Honor, that there wasn't sufficient evidence for the jury to find that the defendant Collis had possession of that drug as required under the statute.

Now, another reason why we felt that we are entitled to a judgment of acquittal or a new trial was this: The Government relied in both cases on possession, a violation of the Harrisson Narcotic Act, and a violation of the Jones-Miller Act. The jury found that the defendant Collis was not guilty of possession under the Harrison Narcotic Act but found that he was guilty of possession under the Jones-Miller Act. It did seem to be very very inconsistent, Your Honor. In other words, they found black and white under the very same facts and circumstances. I think, Your Honor, that perhaps the jury may have been confused somewhat, but undoubtedly the verdict seems to be

205 quite inconsistent, if the theory of the case was possession, and I believe that the Government relied mainly on possession.

There is only one other point. If the Government would contend that in the violation of the Jones-Miller Act, Count Number Two, that the jury found Collis guilty of facilitating the concealment and that they didn't have to show possession on his part, then, Your Honor, that would not be correct because the indictment reads as follows: "...on or about January 2, 1956, within the District of Columbia, Peter T. Collis and William Upshaw facilitated the concealment and sale..." It is in the conjunctive, it is not in a disjunctive, which means that they would have to prove the facilitation of the concealment and sale together.

Now, Your Honor will notice in Count One, under the Harrison Act, the jury found that Collis was not guilty of selling. Therefore, we feel, Your Honor, that for these reasons that the Government had not proved any of the essential elements of the violations under that particular count, and that they relied upon possession. I think the evidence was quite insufficient and quite weak on possession by Collis, and due to the fact that the jury, I think, brought in a very inconsistent verdict, the defendant Collis is either entitled to a judgment of acquittal or at least, Your Honor, a chance for a new trial to bring back
206 these facts before another jury.

THE COURT: What comment does the District Attorney have to make?

MR. McLAUGHLIN: As far as the Government is concerned, I think the evidence was sufficient, as far as the jury was concerned, to find that possession was in both defendants.

As far as the verdict being inconsistent, Your Honor, I have a case here, "Ramirez v. United States", in 23 Fed. 2nd, 788. There, a defendant was charged with the same offense, I mean charged in the first count that he purchased and sold, and all, and not having the original stamped package, and the second count of the indictment charged the defendant with facilitating, and there the jury found the

defendant not guilty on the first count and found him guilty on the second count, and the Court said:

"The verdict finding the defendant guilty as to one count and not guilty as to the other is neither repugnant nor inconsistent, for while we may assume that the transaction charged in each count is the same, the offenses are different, and each offense contains elements not found in the other. Under such circumstances, a verdict of not guilty as to one count is not inconsistent with a verdict of guilty as to the other."

207 So, I think it was within the powers of the jury to find the defendants guilty as they did on either count.

THE COURT: Mr. Weeda, would you like to make any further reply?

MR. WEEDA: Nothing further.

THE COURT: Motion is overruled.

* * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14194

WILLIAM UPSHAW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

291

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
NATHAN J. PAULSON,
Assistant United States Attorneys.

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 28 1958

Joseph W. Stewart

CLERK

No. 14,194

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. May an appellant, by motion to vacate sentence pursuant to Section 2255, raise the question of an alleged illegal search and seizure or other matters concerning the sufficiency and admissibility of evidence on the trial?

2. Where appellant and his codefendant were each convicted of illegal possession of narcotics does reversal of codefendant's conviction on direct appeal justify relief, pursuant to Section 2255, to appellant who failed to appeal?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,194

WILLIAM UPSHAW, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On February 13, 1956, there was filed in the District Court, an indictment charging appellant and a co-defendant (Collis) with violation of the narcotics laws, i. e., 26 U. S. C. 4704 (a) and 21 U. S. C. 174 (J. A. 1). On February 17, 1956, appellant entered a plea of not guilty and was permitted to remain on bond (J. A. 2). On May 10, 1956, a jury found each of them not guilty on Count one (26 U. S. C. 4704a) and guilty on Count two (21 U. S. C. 174) (J. A. 3). On May 25, 1956, appellant was sentenced in open court to a term of imprisonment for a period of sixteen months to four years. The formal judgment was filed in court on May 28, 1956 (J. A. 4). Appellant did not file a notice of appeal from the judgment,[1] but on June

[1] Appellant (p. 28 of his brief) draws the Court's attention to the fact that seven days after his time to appeal had expired he wrote a letter to the Chief Judge of the District Court on "how to go about filing an appeal". He attempts to come within Rule 37, Fed. R. Cr. P. which does not apply here because he had counsel. The rationale of the cases cited is not applicable because in those cases the intent and activity towards appeal were evidenced prior to the expiration date. Here the activity leading to an

26, 1957, appellant filed a "Motion to vacate sentence pursuant to Section 2255, Title 28, U. S. Code" (J. A. 4, 5).[2] On July 2, 1957, Chief Judge Laws denied the motion with the following order (J. A. 9):

> Upon consideration of defendant's motion to vacate sentence pursuant to Section 2255, Title 28 of the United States Code, it appearing to the Court that the files and records herein conclusively show that defendant is entitled to no relief, it is by the Court this 2nd day of July, 1957,
>
> ORDERED that said motion to vacate sentence be and hereby is denied.

Thereafter on October 11, 1957, appellant filed a notice of appeal from the above order (J. A. 10).

STATUTE INVOLVED

Title 28 U. S. C. § 2255 provides, in pertinent part:

> *Federal custody; remedies on motion attacking sentence.*—A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United

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attempt to appeal was after the time to do so had expired. The files of Chief Judge Laws do not contain the letter referred to on page 27 of appellants brief. It should be assumed that no appeal was intended to be filed within the time so allotted. Cf. *Sunal v. Large*, 332 U. S. 174.

[2] Appellant did not set forth the facts referred to in footnote 1 hereof in his motion. Therefore, it should not be considered in this Court. *Waterman v. McMillan*, 77 U. S. App. D. C. 310, 135 F. 2d 807 (1943), cert. denied, 322 U. S. 749 (1944).

States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Title 21 U. S. C. § 174 provides:

> *Same: penalty: evidence.*—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addi-

tion, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

SUMMARY OF ARGUMENT

The law is well settled that questions of alleged illegal search and seizure, sufficiency and admissibility of evidence or the trial judge's failure to direct a verdict of acquittal may not be raised under a motion to vacate sentence pursuant to Section 2255.

The fact that the codefendant's conviction was reversed on appeal does not justify relief to appellant who did not appeal. So long as appellant was accorded all of his procedural constitutional rights at the trial he may not collaterally attack the judgment of conviction under Section 2255. In any event, the record discloses that appellant failed to renew his motion for judgment of acquittal at the close of all the evidence which included appellant's testimony. In that posture of the case, appellant waived his right to have the claimed error reviewed by this Court and permitted the trial judge to consider all of the evidence in the case.

ARGUMENT

Neither the legality of a search and seizure nor the sufficiency or admissibility of evidence may be raised under Section 2255

It has become well settled law that a contention of the illegality of a search and seizure may not be raised under a motion to vacate sentence pursuant to 28 U. S. C. § 2255. And it is fundamental that errors relating to the sufficiency and admissibility of evidence may be raised only on direct appeal. Nor may alleged error in the court's instructions be raised in a motion to vacate. *Martin* v. *United States* — U. S. App. D. C. — (No. 13,686, decided October 3, 1957); *Adams* v. *United States,* 95 U. S. App. D. C. 354, 222 F. 2d 45 (1955); *White* v. *United States,* 98 U. S. App. D. C. 275, 235 F. 2d 221 (1956). In the instant case no motion was made to suppress the evidence. If one had been made and been denied by the District Court, the propriety of the denial could not now be examined in a proceeding under this section. *Martin* v. *United States, supra.* To review the allegations now raised would, in effect, constitute a retrial of the case. This Court has consistently refused to do so.

To warrant relief under Section 2255, appellant must show that either his sentence is illegal or that his conviction is subject to collateral attack by lack of statutory jurisdiction or the violation of a constitutional right which deprived the court of jurisdiction. Only where the accused *at trial* is deprived of a constitutional right may the final judgment become vulnerable to collateral attack. Such is not the case here. Appellant received all the guarantees under the constitution at his trial. The errors complained of consist of, in the main, evidentiary matters which, if they constituted reversible error, must be raised on direct appeal.

The fact that Collis' direct appeal was reversed in no way broadens the scope of Section 2255. And the fact that "this Court must assume that the opinion in the [co-defendant's] case was in the files and records of the District Court" (Br. at p. 10), when the latter denied the motion to vacate should

not be grounds for relief in this case. In that opinion,[3] this Court stated "On this appeal it is not disputed that the co-defendant Upshaw, who did not appeal, had possession of the narcotics in the small vestibule." This statement may be reinforced by the fact that the transcript of testimony which was before the trial judge (App. Br. p. 10), clearly discloses that the codefendant so testified and that the appellant, after testifying in his own behalf and introducing other evidence, failed to renew his motion for a judgment of acquittal. In the posture of the case at that time, appellant waived his right to have the claimed error reviewed in this Court while permitting the trial judge to consider all the evidence in the case. The denial by appellant of his codefendant's testimony served only to create an issue of fact for the jury to decide. This Court in *Battle* v. *United States*, 92 U. S. App. D. C. 220, 206 F. 2d 440 (1953) stated:

> "Moreover, appellant's failure to move for acquittal at the close of the case bars his right to review of the motion for judgment after the verdict.[2]

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[2] Appellant did move for a directed verdict when the Government rested its case, but, following denial and the introduction of evidence in his behalf, failed to renew his motion at the close of all the evidence. *Mosca* v. *United States*, 9 Cir. 1949; 174 F. 2d 451, and the cases cited in footnote 10 therein; *Hall* v. *United States*, 83 U. S. App. D. C. 166, 169, 168 F. 2d 161, 164, 4 A. L. R. 2d 1193, certiorari denied, 334 U. S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775, rehearing denied 1948, 335 U. S. 839, 69 S. Ct. 9, 93 L. Ed. 191; *Crotty* v. *United States*, 1947, 82 U. S. App. C. C. 236, 243, 163 F. 2d 844, 851; *Ansley* v. *United States*, 5 Cir. 1943, 135 F. 2d 207."

See also *Ladrey* v. *United States*, 81 U. S. App. D. C. 127, 155 F. 2d 417 (1946); *Perovich* v. *United States*, 205 U. S. 86, 27 S. Ct. 456; *Murray* v. *United States*, 53 App. D. C. 119, 126, 288 F. 1008.

The reversal of the codefendant's conviction cannot be said to have proved appellant innocent, especially so in the light of Collis' testimony. For it is a fair assumption that the jury believed appellant to be guilty of possession of the narcotics and chose to disbelieve the codefendant's professions of innocence.

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[3] *Collis* v. *United States*, — U. S. App. D. C. — (No. 13,539, decided June 27, 1957).

Furthermore, the Supreme Court has held that a subsequent controlling decision rendering erroneous a ruling of law by the trial court was not sufficient to grant a writ of habeas corpus. *Sunal* v. *Large*, 332 U. S. 174 (1947), that Court went on to say:

> "We are dealing here with a problem which has radiations far beyond the present cases. The Courts which tried the defendants had jurisdiction over their persons and over the offense. They committed an error of law in excluding the defense which was tendered. The error did not go to the jurisdiction of the trial court. Congress, moreover, has provided a regular, orderly method for correction of all such errors by granting an appeal to the Circuit Court of Appeals and by vesting us with certiorari jurisdiction. It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. *Warring* v. *Colpoys* (F) *supra*. If in such circumstances habeas corpus could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.
>
> An endeavor is made to magnify the error in these trials to constitutional proportions by asserting that the refusal of the proffered evidence robbed the trial of vitality by depriving defendants of their only real defense. But as much might be said of many rulings

during a criminal trial. Defendants received throughout an opportunity to be heard and enjoyed all procedural guaranties granted by the Constitution. Error in ruling on the question of law did not infect the trial with lack of procedural due process."

A similar argument to the one set forth in the above case is advanced by appellant. Under the rationale of that decision, the instant contention must fail.

CONCLUSION

Wherefore, it is respectfully submitted that the decision of the District Court be affirmed.

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